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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1497.

THE BELL'S GAP RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED OCTOBER 31, 1889.

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INDEX.

	Original.	Print.
Writ of error to supreme court of Pennsylvania	1	1
Citation	3	2
Proof of service of citation	3	2
Return to writ of error	4	2
Transcript from court of common pleas	4	2
Appearance docket entries	4	2
Appeal bond	5	3
Appeal	7	4
Specifications of objections	7	4
Narr.	9	5
Account	11	7
Stipulation waiving jury	12	7
Stenographer's transcript	13	8
Findings and opinion	15	9
Exceptions filed by the Commonwealth	16	9
Opinion upon exceptions	18	11
Docket entries	19	11
Judgment	19	12
Præcipe for writ of error to court of common pleas	21	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 30, 1889.

	Original.	Print.
Writ of error to court of common pleas	22	12
Specifications of error	24	13
Order for re-argument	26	14
Opinion	27	14
Order to return transcript to Supreme Court U. S.	28	14
Petition for writ of error	29	14
Allowance of writ of error	33	19
Bond	34	19
Clerk's certificate	36	20

1 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State — Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Commonwealth of Pennsylvania, appellant, and The Bell's Gap Railroad Company, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of

2 a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said appellee, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the eleventh day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed Feb'y 11, 1889, by—

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court U. S.

[Endorsed:] 32. May 7, 1888. Filed in supreme court, middle district, Feb. 13, 1889.

3 The United States of America to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the middle district, wherein The Bell's Gap Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this 11th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

JOSEPH P. BRADLEY.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

I, James W. M. Newlin, being duly sworn according to law, depose and say that I mailed this citation and a copy thereof to Hon. W. S. Kirkpatrick, attorney general of Pennsylvania, on February 12, 1889; that he received the same the next day, and that subsequently I served the same upon him by showing him the original and handing him a copy thereof.

JAMES W. M. NEWLIN.

Sworn and subscribed before me this seventh day of March, 1889.

[Seal H. Homer Dalbey, Notary Public, Philadelphia.]

H. HOMER DALBEY,
Notary Public.

[Endorsed:] Att'y gen'l. Bell's Gap Railroad Company *vs.* Commonwealth of Pennsylvania. Error to supreme court of Pennsylvania. Citation.

4 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

Copy of Appearance Docket Entries.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to No. 53 March term, 1888, is contained the following copy of appearance docket entries, March term, A. D. 1888:

COMMONWEALTH OF PENNSYLVANIA *vs.* BELL'S GAP RAILROAD COMPANY. } Appeal from the Settlement of the Auditor General and State Treasurer.

[On margin:] Kirkpatrick. Newlin. 53.

Jan. 18, 1888.—Appeal and specification of objections filed.
Jan. 19, 1888.—Bond filed.
Jan. 27, 1888.—*Narr.* and copy of account filed.
Feb. 24, 1888.—Stipulation to try without jury filed.
May 16, 1888.—Treasurer's affidavit filed.
May 8, 1888.—Stenographer's notes filed.
May 8, 1888.—Opinion and findings of the court filed, deciding in favor of the defendant.
May 16, 1888.—Exceptions on the part of the Commonwealth filed; same day overruled, except as to 6th exception, and judgment entered in accordance with opinion filed.
May 21, 1888.—Writ of error, No. 32, May term, 1888,
5 from supreme court received and filed.
Certified.

W. H. ULRICH,
Prothonotary.

[Seal of the Court of Common Pleas of Dauphin County.]

(*Appeal Bond. Filed Jan. 19th*, 1888.)

Know all men by these presents that The Bell's Gap Railroad Company and Charles F. Berwind and F. S. Lewis are held and firmly bound unto The Commonwealth of Pennsylvania in the sum of three thousand two hundred dollars, lawful money of the United States, to be paid to the said Commonwealth; to which payment, well and truly to be made, we, the said obligors, hereby bind ourselves, our successors, heirs, executors, and administrators, by these presents.

Sealed with our seals and hands this 24th day of December, A. D. 1887.

Whereas the said company has appealed to the common pleas of Dauphin county from the settlement of account made against it by the auditor general and State treasurer on the sixth day of December, 1887, for taxes on scrip, bonds, and certificates of indebtedness of said company, alleged to be due to the Commonwealth of Pennsylvania for the year ending the first Monday of December, 1887:

Now, the condition of this bond is such that if the said company shall pay to the Commonwealth whatever taxes and
6 costs may be finally adjudged to be due to the Commonwealth of Pennsylvania, then this obligation to be void; otherwise to be and remain in full force and virtue.

THE BELL'S GAP RAILROAD COMPANY,
By CHARLES F. BERWIND, *President.*
CHARLES F. BERWIND. [SEAL.]
F. S. LEWIS. [SEAL.]

Sealed and delivered in the presence of us—
A. R. BOSLER.
GEORGE D. BARROW.

Attest: F. S. LEWIS, *Secretary.*

[Seal of The Bell's Gap R. R. Co.]

And now, Jan. 7th, 1888, the above bond is approved and the sureties certified to be sufficient.

JOSEPH ALLEMAN,
President Judge of the Common Pleas of Philadelphia.

Jan. 19th, 1888.—The security of the within bond is approved.
By the court:

J. W. SIMONTON, *P. J.*

7 *Appeal. Filed in Auditor General's Department Jan.* 10, 1888. *Filed in Court of Common Pleas Jan.* 18, 1888.

The appeal and specifications were as follows:

In the matter of the account settled by the State treasurer and auditor general of Pennsylvania against the Bell's Gap Railroad Company for tax on loans under the act of June 30, 1885, on $539,000 of loans claimed by the Commonwealth to be held by residents of Pennsylvania for the year ending the first Monday of November, 1887, at three mills on the nominal face value thereof.

The said company hereby appeals therefrom to the court of common pleas of Dauphin county and assigns the following specifications of objections thereto:

I. The tax claimed is void for want of uniformity and for want of an assessment under article IX, section 1, of the constitution of Pennsylvania.

II. The report of the company's treasurer was made under protest and does not constitute an assessment, and the tax ought to be imposed on so much of the company's loans as the Commonwealth claims to be held by residents of Pennsylvania for their nominal or face value, which varies from the market value on account of the differing rates of interest, times of maturity, and for other reasons affecting their real value is illegal, and the said tax cannot be lawfully deducted by the company's treasurer from the interest payable to the holders of said loans, and the Commonwealth's demands contravene section one, the fourteenth amendment to the Constitution of the United States, for the following reasons:

8 (*a.*) The act of June 30, 1885, provides no lawful means for assessing the tax.

(*b.*) The Legislature has no power to direct the payment of a tax upon any other than the real value of the bonds upon lawful and uniform assessment by lawfully constituted assessors against the resident owners thereof and upon notice to them, and an opportunity to be heard and to pay under protest.

(*c.*) The legislative mandate is void as being an attempt to exercise executive functions by fixing an artificial value on the bonds for the purpose of taxation.

(*d.*) The bonds held by residents of Pennsylvania are not property in the hands of this company, but are property and taxable only in the hands of the owners.

(*e.*) The company's treasurer has no power to lawfully assess said tax and has made no assessment thereof. His return does not con-

stitute an assessment, and his deducting the tax from the interest payable to the resident bondholders would be taking their property without "due process of law," and would be contrary to "the law of the land," and would be a denial to the resident bondholder of the "equal protection of the laws," all other personal property being taxed by the State at its actual value to its owners upon notice to them by lawful assessors.

III. If any tax on said loans of the company be charged to the appellant under an act of Assembly the amount thereof cannot exceed the rate fixed by the act of June 30, 1885, and this rate is three mills upon the interest and not upon the principal of the bonds.

IV. No proof has been made so as to determine what bonds are held by non-residents.

V. No method is provided for ascertaining the names and residences of the bondholders, and they are unknown to the company and its treasurer.

VI. $20,000 of said bonds are exempt, being held and owned by Pennsylvania corporations as part of their capital stock, which the Commonwealth taxes separately and directly to such corporations for the same year.

VII. The tax is void as impairing the company's obligation to its creditors.

VIII. Neither the corporation nor its treasurer can lawfully be required to deduct the tax.

THE BELL'S GAP RAILROAD COMPANY,
By JAMES W. M. NEWLIN,
Attorney for the said Company.
CHAS. F. BERWINE, *President.*

Attest: F. S. LEWIS, *Secretary.*

9 *Narr. Filed Jan.* 27, 1888.

In Dauphin Common Pleas. No. 53. March Term, 1888.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of the Bell's Gap Railroad Company of a plea that they render unto the said Commonwealth the sum of one hundred thousand dollars lawful money of the United States, which they owe to and unjustly detain from her, for that whereas the said defendants, on the first day of December, A. D. 1887, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of one thousand five hundred and thirty-six $\frac{15}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor general of this Commonwealth and duly entered in the books of his office, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon, at the rate of twelve per

centum per annum, from and after the expiration of sixty days from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth for tax on scrip, bonds, and certificate of indebtedness, per act of June 30th, 1885, for the year ending first Monday of November, 1887, which said account was, on the sixth day of December, A. D. 1887, submitted to, revised and approved by the State treasurer, and a copy thereof thereafter sent by the said auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and — appealed from; whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, parcel of the said sum above demanded, with interest and other legal charges; and, being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff on request the said last-mentioned sum of money;

And whereas also the said defendants, on the day and year in the first count first mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned, for money then and there had and received by the said defendants to and for the use of the said plaintiff; and also a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor general of this Commonwealth against the said defendants, on the day and year in the first count mentioned, for tax on scrip, bond, and certificate of indebtedness, and approved by the State treasurer on the day and year in the first count mentioned;

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request; yet the said defendants have disregarded their said promises, and although often requested so to do have not as yet paid any of the said several sums of money or any part thereof, to the damage of the said plaintiff of one hundred thousand dollars, and therefore she brings suit, &c.

JOHN F. SANDERSON,
Deputy Attorney General.

11 A.—Form 9.

Copy of Accounts. Filed Jan. 27, 1888.

Bell's Gap Railroad Company in account with the Commonwealth of Pennsylvania, Dr.

For tax on scrip, bonds, and certificates of indebtedness per section four of the act of June 30, 1885, for the year ending first Monday of November, 1887, as per report herewith filed.	
Nominal value of scrip, bonds, and certificates of indebtedness owned by residents of Pennsylvania, $539,000.00.	
Tax, three mills	$1,617 00
Deduct treasurer's commission	80 85
Due Commonwealth	$1,536 15

Interest at 12 per centum from 60 days after date of settlement. Remit to State treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, PA., *Dec.* 1, 1887.

Settled and entered:

JOHN A. GLENN,
For A. WILSON NORRIS,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, PA., *Dec.* 6, 1887.

Approved:

W. LIVSEY,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Jan'y* 18, 1888.

[Seal of Auditor General's Department.]

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

JOHN A. GLENN,
For A. WILSON NORRIS,
Auditor General.

12 *Stipulation to Try Without Jury. Filed Feb.* 24, 1888.

In the Court of Common Pleas of Dauphin County. March Term, 1888.

COMMONWEALTH OF PENNSYLVANIA
vs.
BELL'S GAP RAILROAD COMPANY. } No. 53.

It is hereby agreed that a trial by jury be dispensed with in the

above-stated case, and that the same be submitted to the decision of the court, to be heard and determined under the provisions of an act entitled "An act to provide for the submission of civil cases to the decision of the court and to dispense with trial by jury," approved the 22d day of April, 1874, subject, however, to a writ of error as in other cases, at the option of either party.

Feb. 24, 1888.

JNO. F. SANDERSON,
Deputy Attorney General.
JAMES. W. N. NEWLIN,
For Def't.

13 *Stenographer's Transcript. Filed May* 8, 1888.

Dauphin County, Pa., Court of Common Pleas. March Term, 1888.

THE COMMONWEALTH
versus
THE BELL'S GAP RAILROAD COMPANY. } No. 53.

Appeal.

Tried before Hon. John W. Simonton, president judge, and Hon. John B. McPherson, additional law judge, without a jury, at Harrisburg, — a. m., February 24, 1888.

Appearances: Commonwealth, Deputy Attorney General Sanderson; defence, J. W. M. Newlin.

Reported and transcribed in compliance with the act of Assembly, approved May 24, A. D. 1876.

H. C. DEMMING,
Court Stenographer.

14 HARRISBURG, PA., *Fryday, February* 24, 1888.

Deputy Attorney General Sanderson, having stated the case for Commonwealth, offers in evidence the report, account, and settlement.

Commonwealth rests.

Defendant's counsel offers in evidence the appeal and specifications of objections.

Mr. NEWLIN: The attorney general is willing that the affidavit of the treasurer of the Bell's Gap Railroad Company shall be offered in evidence the same as if he had been called as a witness and examined.

Defendant's counsel offers in evidence affidavit of A. G. Cassett. (Read.)

Defence rest.

Argument.

15 *Findings and Opinion of the Court Below. Filed May* 8, 1888.

Dauphin County Common Pleas. March Term, 1888.

COMMONWEALTH OF PENNSYLVANIA
vs.
BELL'S GAP RAILROAD COMPANY. } No. 53.

Appeal from settlement of account.

By the COURT: This case was tried by the court, as provided by the act of April 22, 1874.

It originated in an account settled against the defendant for tax on scrip, bonds, and certificates of indebtedness for the year ending first Monday of November, 1887, from which settlement defendant entered an appeal to this court, as authorized by the act of 1811, relative to public accounts.

We find from the evidence the following facts:

1. The bonded indebtedness of the defendant amounts to $539,000, nominal value. This indebtedness was all contracted and the bonds representing the same were issued prior to June 30, 1885. The amount of said bonds owned by residents of Pennsylvania, so far as shown by the evidence, is $203,000 and the amount owned by Pennsylvania corporations is $20,000. No evidence was offered to show the ownership of the remaining $317,000 and we are unable to find whether the same are owned by residents of Pennsylvania or not.

2. The report upon which the settlement appealed from is based was made under protest, and avers that the corporation does not know who are the owners of these bonds or what proportion
16 thereof are owned by residents of Pennsylvania or by non-residents, and that the treasurer has made no assessment whatever of the bonds and has retained no tax on the payment of interest thereon. Tax is claimed in the settlement appealed from upon the whole amount of defendant's indebtedness.

Conclusions of law.

For the reasons given in the opinions recently filed in Commonwealth *v.* Delaware Division Canal Company, No. 170, September term, 1887, and in Commonwealth *v.* City of Chester, No. 191, March term, 1887, both in Dauphin county common pleas, judgment is directed to be entered in this case in favor of defendant unless exceptions be filed within the time limited by law.

(Signed) J. W. SIMONTON, *P. J.*

VII.

Exceptions Filed by the Commonwealth in the Court Below May 16th, 1888.

Dauphin County Common Pleas. March Term, 1888.

COMMONWEALTH
vs.
BELL'S GAP RAILROAD CO. } No. 53.

Exceptions on behalf of the Commonwealth.

1. The learned court erred in its conclusions of law as follows:

"For the reasons given in the opinions recently filed in Commonwealth *vs.* Delaware Division Canal Company, No. 170, September term, 1887, and in Commonwealth *vs.* City of Chester, No. 191, March term, 1887, both in Dauphin county common pleas, judgment is directed to be entered in this case in favor of defendant unless exceptions be filed within the time limited by law."

17 2. The learned court erred in not directing judgment to be entered in favor of the Commonwealth for the amount of her claim.

3. The learned court erred in adopting, in its opinion, the first conclusion of law in the Delaware Division Canal case aforesaid, which was as follows:

"That section four of the act of June 30, 1885, is repugnant to section one of article nine of the constitution of Pennsylvania, which ordains that 'all taxes shall be uniform within the territorial limits of the authority levying the same,' and is therefore void."

4. The learned court erred in adopting the second conclusion of law in the case aforesaid, which was as follows:

"That the settlement appealed from in this case is illegal and invalid, because the taxes claimed therein under section four of the act of June 30, 1885, are not uniform, as required by section one of article nine of the constitution."

5. The learned court erred in adopting the third conclusion of law in the case aforesaid, which was as follows:

"That the defendant in this case has the legal right to interpose the defence of the unconstitutionality of the act and the invalidity of the settlement made under it."

6. The learned court erred in not finding as matter of fact that the average values of the corporate loans in question were substantially as follows:

	Highest.	Lowest.	Average, excluding quotations under 50.		Average, excluding quotations under 25.	
			High.	Low.	High.	Low.
Exhibit A	$99\frac{3}{8}$	$97\frac{1}{4}$	$106\frac{4}{5}$	$105\frac{1}{8}$	$101\frac{5}{6}$	$99\frac{5}{6}$
Exhibit B	$100\frac{5}{8}$	$98\frac{1}{4}$	$109\frac{3}{4}$	$109\frac{3}{4}$	$101\frac{1}{2}$	$101\frac{1}{2}$
Exhibit C	$103\frac{3}{4}$	$101\frac{3}{4}$	$106\frac{9}{14}$	$104\frac{3}{14}$	$106\frac{6}{7}$	$104\frac{3}{17}$
Exhibit D	$91\frac{5}{8}$	$91\frac{5}{8}$	$92\frac{2}{3}$	$91\frac{3}{4}$	$92\frac{2}{3}$	$91\frac{3}{4}$
Exhibit E	$88\frac{1}{2}$	$86\frac{1}{2}$	$96\frac{3}{5}$	$94\frac{3}{5}$	$92\frac{1}{2}$	$90\frac{5}{8}$

General average of all the foregoing, 98.

General average, excluding quotations under 50, 101.

In making the foregoing table, where quotations for each of the months of the year were given, the quotations of but one month were taken as the basis of calculation.

18 7. The learned court erred in not passing specifically upon all of the specifications in the appeal of the defendant.

8. The learned court erred in not directing judgment in favor of the Commonwealth for the amount of her claim.

JNO. F. SANDERSON,
Deputy Attorney General.

Opinion of the Court Below upon the Exceptions. Filed May 16th, 1888.

Dauphin County Common Pleas. March Term, 1888.

COMMONWEALTH
v.
BELL'S GAP RAILROAD CO. } No. 53.

Opinion on exceptions.

By the COURT:

We sustain exception No. 6, and so far as to find that the arithmetical calculation therein contained is substantially correct. In doing this we adopt our remarks contained in our opinion in Commonwealth *v.* Delaware Division Canal Co., No. 170, September term, 1887, made in passing upon a similar exception.

We do not think it necessary to add anything to what has been already said in our opinion heretofore filed in this case, and therefore the exceptions, except as above stated, are overruled and judgment is directed to be entered in accordance with said opinion.

J. W. SIMONTON, *P. J.*

19 In the Supreme Court of Pennsylvania in and for the Middle District of said Court.

At a supreme court of the State of Pennsylvania, sitting in and for the middle district of said court, at the city of Harrisburg, Pennsylvania, on the 21st Monday following 1st Monday of January, A. D. 1888—present, Hon. Isaac G. Gordon, chief justice, and Hon. Edward M. Paxson, James P. Sterrett, Henry Green, Silas M. Clark, and Henry W. Williams, justices, and William Pearson, prothonotary of the said supreme court of Pennsylvania in and for the said middle district, to May term, 1888, No. 32—it is contained as follows, to wit:

(*Copy of the Supreme Court Docket Entries.*)

Writ of error to the court of common pleas of Dauphin county.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below,
vs.
BELL'S GAP RAILROAD COMPANY, Defendant Below. } No. 53. March Term, 1888.

May 18, 1888.—Precipe filed.
Eo die, exit writ of error r't'ble May 28th, 1888.
May 26th, 1888.—Record returned and filed.
May 31st, 1888.—Argued.

June 1st, 1888.—Reargument ordered in western district.

Jan. 9th, 1889.—Argued in eastern district.

Feb. 4th, 1889.—Judgment reversed and judgment entered in favor of the Commonwealth and against the defendant in the sum of $666.60, with interest at the rate of 12 per cent. per annum from the 5th of Feb., 1888, and costs.

Per CLARK, *J.*

20 Feb. 13th, 1888.—Writ of error from the Supreme Court of the United States received and filed.

Eo die, petition for allocatur of said writ by said court.

Allocatur of said writ by Hon. Joseph P. Bradley, justice of said court; writ of error bond, in the sum of $1,500.00, approved by said Hon. Joseph P. Bradley, received and filed.

March 8th, 1889.—Citation from said Hon. Joseph P. Bradley and affidavit of service on W. S. Kirkpatrick, attorney general of Pa., filed.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of Supreme Court.

21 (*Precipe. Filed May* 18, 1888.)

In the Supreme Court of Pennsylvania for the Middle District.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below, Plaintiff in Error,
vs.
BELLL'S GAP RAILROAD COMPANY, Defendant Below, Defendant in Error.

Issue writ of error to the court of common pleas of Dauphin county to remove the record and proceedings in a certain action of assumpsit depending therein to No. 53, of March term, 1888, returnable to May term, 1888.

JOHN F. SANDERSON.
Deputy Attorney General, Attorney for Plaintiff in Error.

To William Pearson, prothonotary supreme court of Pa., middle district.

22 (*Writ of Error.*)

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

Seal of the Supreme Court.

Because in the record and process, and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ, between The Commonwealth of Pennsylvania, plaintiff in error, and The Bell's Gap Railroad Company, defendant in error, as it is said, manifest error hath inter-

vened, to the great damage of the said plaintiff in error, as by complaint of the same plaintiff in error we have received information, we, willing that if any error be therein it should be corrected and that speedy justice be done to the parties in this part, do command you that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the 21st Monday following 1st Mon. of Jan., 1888, being the 1st Monday of the term, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable Isaac G. Gordon, doctor of laws, chief justice of our supreme court, at Harrisburg, the 18th day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Commonwealth the one hundred and twelfth.

WILLIAM PEARSON,
Prothonotary.

23 (Endorsement on writ of error:) No. 32. May term, 1888. Supreme court, middle district. Commonwealth of Penna., plaintiff in error, *vs.* Bell's Gap Railroad Company, defendant in error. Filed May 21st, 1888. Writ of error to the court of C. P. for the county of Dauphin. (No. 53, March term, 1888.) Returnable the 21st Mon. foll. 1st Monday of Jan., 1888. Rule on the defendant in error to appear and plead on the return day of the writ. N. B.—10 days' notice to the parties or counsel below is necessary to compel an appearance. Filed in supreme court May 26th, 1888. Service of writ accepted by def't. J. W. M. Newlin.

Return of the Court of Common Pleas.

The record and process and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

J. W. SIMONTON, *P. J.* [L. S.]

24 *Specifications of Error.*

1. The learned court below erred in overruling the first exception filed on the part of the Commonwealth. The exception was in these words:

1. The learned court erred in its conclusions of law as follows:

"For the reasons given in the opinions, recently filed, in Commonwealth *vs.* Delaware Division Canal Company, No. 170, September term, 1887, and in Commonwealth *vs.* City of Chester, No. 191, March term, 1887, both in Dauphin county common pleas, judgment is directed to be entered in this case in favor of defendant, unless exceptions be filed within the time limited by law."

2. The learned court below erred in overruling the second exception filed on the part of the Commonwealth. The exception was in these words:

2. The learned court erred in not directing judgment in favor of the Commonwealth for the amount of her claims.

3. The learned court below erred in overruling the third exception filed on the part of the Commonwealth. The exception was in these words:

3. The learned court erred in adopting its opinion, the first conclusion of law in the Delaware Division Canal case aforesaid, which was as follows:

"That section four of the act of June 30, 1885, is repugnant to section one of article nine of the constitution of Pennsylvania, which ordains that all taxes shall be uniform within the territorial limits of the authority levying the same, and is therefore void."

4. The learned court below erred in overruling the fourth exception filed on the part of the Commonwealth. The exception was in these words:

25 4. The learned court erred in adopting the second conclusion of law in the case aforesaid, which was as follows:

"That the settlement appealed from in this case is illegal and invalid, because the taxes claimed therein under section four of the act of June 30, 1885, are not uniform, as required by section one of article nine of the constitution."

5. The learned court below erred in overruling the fifth exception filed on the part of the Commonwealth. The exception was in these words:

5. The learned court erred in adopting the third conclusion of law in the case aforesaid, which was as follows:

"That the defendant in this case has the legal right to interpose the defense of the unconstitutionality of the act and the invalidity of the settlement made under it."

6. The learned court below erred in overruling the seventh exception filed on the part of the Commonwealth. The exception was in these words:

"The learned court erred in not passing upon all of the specifications in the appeal of the defendant."

7. The learned court below erred in overruling the eighth exception filed on the part of the Commonwealth. The exception was in these words:

"The learned court erred in not directing judgment in favor of the Commonwealth for the amount of her claim."

26 (*Order for Reargument. Filed in Supreme Court June* 1, 1888.)

COMMONWEALTH OF PENNSYLVANIA *vs.* BELL'S GAP RAILROAD COMPANY. } No. 32. May Term, 1888. Error to Common Pleas of Dauphin County.

And now, June 1st, 1888, it is ordered that the above case and numbers 34, 35, & 37 argued with it be reargued, and that they be placed at the head of the list for the 2d Monday of October next, at

Pittsburgh, for that purpose, a copy of this order to be certified to the prothonotary of the western district. (*Per curiam.*)

(*Opinion of the Supreme Court of Pennsylvania. Filed Feb.* 4, 1889.)

27 In the Supreme Court of Pennsylvania, Middle District.

COMMONWEALTH OF PENNSYLVANIA *vs.* BELL'S GAP RAILROAD CO. } Error to the Court of Common Pleas of Dauphin County. No. 32. May Term, 1888.

CLARK, *J.*:

The amount of the outstanding indebtedness of the Bell's Gap Railroad Company in the hands of persons residing in Pennsylvania on the first Monday of November, 1887, according to the finding of the learned judge of the court below, was $202,000.

For the reasons given in our opinion filed in the case of the Commonwealth *vs.* Delaware Division Canal Co., argued at the present term, the judgment is reversed, and judgment is now entered against the defendant and in favor of the Commonwealth for the sum of six hundred and sixty-six dollars and sixty cents, with interest at the rate of 12 per cent. per annum from the 5th day of Feb., 1888, with *cots* and costs.

28 And now here, on this day, to wit, February 15th, 1889, the said Bell's Gap Railroad Co. produced to the supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the 2nd Monday of October next, which writ of error is hereunto annexed.

In pursuance whereof and according to the form and effect of the act of Congress in such case made and provided a transcript of the record and proceedings of the judgment aforesaid so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

29 & 30 To the Honorable the Supreme Court of the United States

The petition of the Bell's Gap Railroad Company respectfully showeth that the Commonwealth of Pennsylvania brought suit into the supreme court of Pennsylvania for the middle district to May term, 1888, No. 32, by writ of error from a judgment of the court of common pleas of Dauphin county of March term, 1888, No. 53, in which suit in the said supreme court The Commonwealth of Pennsylvania was appellant and was also plaintiff in the court of common pleas of Dauphin county, and your petitioners were defendants in the court of common pleas of Dauphin county and appellees in the supreme court of Pennsylvania.

That your petitioner is a railroad company incorporated by the State of Pennsylvania, and that the said suit in the said court of

common pleas of Dauphin county was an appeal from a settlement made by the auditor general and State treasurer of Pennsylvania on a report of said railroad company, showing the amount of its bonded indebtedness to be $539,000, which settlement charged the said Bell's Gap Railroad Company with a tax of three mills on its entire bonded indebtedness of $539,000 for the year ending the first Monday of November, 1887, as if it had deducted it from the interest payable to its bondowners, which tax was claimed by the Commonwealth of Pennsylvania under section four of the act of June 30, 1885, whereby it is enacted as follows:

"SECTION 4. That hereafter it shall be the duty of the treasurer of each private corporation incorporated by or under the laws of this Commonwealth or the laws of any other State or of the United States and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond, or certificate of indebtedness issued by said corporation to residents of this Commonwealth and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt and to report on oath annually on the first Monday of November to the auditor general the amount of indebtedness of the corporation owned by residents of this Commonwealth as nearly as the same can be ascertained, and it shall be its further duty to deduct three mills on every dollar of the interest paid as aforesaid and return the same into the State treasury within fifteen days after the thirty-first day of December in each year, and his compensation for his services shall be the same that city and borough treasurers receive for similar services, and for every failure to assess and pay said tax and make report as aforesaid the auditor general shall add ten percentum as a penalty to the amount of the tax in payment of said tax by a corporation; the bonds, certificates, or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

And your petitioners averred in their said appeal from the settlement so as aforesaid made against them by the auditor general and State treasurer and in the subsequent proceedings in the common pleas of Dauphin county and in the supreme court of Pennsylvania that they were not liable to the tax of $1,536.15 charged against them in the said settlement or to pay any part of the same, because your petitioner claimed that the said tax which the said Commonwealth of Pennsylvania demanded that your petitioners should deduct from the interest payable to
31 the owners of their bonds residing in the Commonwealth of Pennsylvania was in contravention of article 1, section 10, clause one, and also in contravention of the fourteenth amendment of the Constitution of the United States for the following reasons:

I. The report of the company's treasurer was made under protest and does not constitute an assessment, and the tax sought to be imposed on so much of the company's loans as the Commonwealth claims to be held by residents of Pennsylvania for their nominal or face value, which varies from the market value on account of the

differing rates of interest, times of maturity, and for other reasons affecting their real value, is illegal; and the said tax cannot be lawfully deducted by the company's treasurer from the interest payable to the holders of said loans, and the Commonwealth's demand contravenes the Constitution of the United States for the following reasons:

(*a.*) The act of June 30, 1885, provides no lawful means for assessing the tax.

(*b.*) The Legislature has no power to direct the exaction of a tax upon any other than the real value of the bonds upon lawful and uniform assessment by lawfully constituted assessors against the resident owners thereof and upon notice to them and an opportunity to be heard and to pay under protest.

(*c.*) The legislative mandate is void as being an attempt to exercise executive functions by fixing an artificial value on the bonds for the purpose of taxation, which must necessarily produce inequality of taxation.

(*d.*) The bonds held by residents of Pennsylvania are not property in the hands of this company, but are property and taxable only in the hands of the owners.

(*e.*) The company's treasurer has no power to lawfully assess said tax and has made no assessment thereof. His return does not constitute an assessment and his deducting the tax from the interest payable to the resident bondholders would be taking their property without "due process of law," and would be contrary to "the law of the land" and would be a denial to the resident bondholder of the "equal protection of the laws," all other personal property being taxed by the State at its actual value to its owners upon notice to them by lawful assessors.

II. No method is provided for ascertaining the names and residences of the bondholders, and they are unknown to the Commonwealth and the company and its treasurer as to $317,000 thereof, and no tax can be collected thereon.

III. The tax is void as impairing the company's obligation to its creditors by requiring it to retain the tax from the bondholders' interest without notice or assessment.

IV. Neither the corporation nor its treasurer can lawfully be required to deduct the tax or to act as the Commonwealth's agents therefore.

31½ Petitioners further aver that upon the trial of this cause in the court of common pleas of Dauphin county your petitioners submitted to the said court of common pleas of Dauphin county certain points embodying the aforesaid claims under the Constitution of the United States, all of which points were negatived by the said common pleas of Dauphin county, but the cause was decided in favor of your petitioners on other grounds arising under the constitution of Pennsylvania; that thereupon the Commonwealth of Pennsylvania took a writ of error to the supreme court of Pennsylvania, middle district herein, to May term, 1888, No. 32, and that upon the argument of the said writ of error in the supreme court of Pennsylvania the Commonwealth of Pennsylvania contended that the tax

claimed from the petitioners was valid both under the constitution of Pennsylvania and the Constitution of the United States, and your petitioners did in the supreme court of Pennsylvania contend that the tax claimed in said suit by the Commonwealth of Pennsylvania was contrary to the provisions of the fourteenth amendment to the Constitution of the United States for the reasons heretofore set forth.

Your petitioners further aver that upon the 4th day of February, 1889, the supreme court of Pennsylvania, sitting at Philadelphia, ordered said judgment of the court of common pleas of Dauphin county to be reversed, and thereupon upon the same day ordered judgment to be entered in favor of the Commonwealth of Pennsylvania and against your petitioners for $666.60, with interest at twelve per centum from February 5, 1888, and costs being State tax of three mills on the portion of the bonds of your petitioners held by residents of Pennsylvania, notwithstanding your petitioners' contention that said tax was wholly void under the provisions of the fourteenth amendment to the Constitution of the United States, as hereinbefore set forth; which said judgment was afterwards, upon the 5th day of February, 1889, duly entered and recorded in the middle district of the supreme court of Pennsylvania as aforesaid.

32

Your petitioners further show that the said judgment of the said supreme court of Pennsylvania is a judgment of the highest court of record of the Commonwealth of Pennsylvania; that the judgment of the said court is final; that the right, title, privileges, and immunities claimed by your petitioners, defendants and appellees aforesaid, were claimed under the provisions of the Constitution of the United States particularly set forth in the points of charge as so submitted to the court of common pleas of Dauphin county, as hereinbefore particularly set forth.

That article 3, section 8, of the Constitution of the United States provides that the judicial power of the United States shall extend to all cases of law and equity arising under the Constitution and laws of the United States referring to the said subject-matters, all of which appears of record.

That the decision and judgment of the supreme court of Pennsylvania aforesaid was against the right, title, privilege, and immunity so claimed by your petitioners under the Constitution of the United States.

That the said court of common pleas of Dauphin county and the said supreme court of Pennsylvania in the said judgment herein entered against the petitioners affirmed the constitutionality of the said fourth section of the act of Assembly of the Commonwealth of Pennsylvania of June 30, 1885, entitled "A further supplement to an act entitled An act to provide revenue by taxation," approved the seventh day of June, 1879, and therefore the said proceedings and judgment aforesaid are null and void and contrary to the Constitution and statute laws of the United States in the premises.

33

Your petitioners therefore pray for the allowance of a writ of error to the supreme court of Pennsylvania in order that the said judgment of the supreme court of Pennsylvania may be re-

examined and reversed or affirmed in the Supreme Court of the United States, and they will ever pray, etc., etc.

THE BELL'S GAP R. R. CO.,
By CHAS. F. BERWIND, *Pres.*

Attest:
[L. S.] FRANK S. LEWIS, *Sec'y.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } ss:

The Bell's Gap Railroad Company, by Charles F. Berwind, deposes and says that he is president of the said Bell's Gap Railroad Company, the petitioners, and, on behalf of the said company, he says that the facts in the above petition stated are true to the best of his knowledge and belief.

CHAS. F. BERWIND.

Sworn to and and subscribed before me this 9th day of February, 1889.

[L. S.] SAMUEL BELL,
Commissioner.

(*Allowance of Writ of Error.*)

Writ of error allowed Feb. 11, 1889.

JOSEPH P. BRADLEY,
Associate Justice Sup. Court of United States.

[Endorsed:] Bell's Gap. Petition. Feb. 9, 1889. Correct copy.

34 (*Writ of Error Bond.*)

Know all men by these presents that we, the Bell's Gap Railroad Company, Charles F. Berwind, and Frank S. Lewis, are held and firmly bound unto the Commonwealth of Pennsylvania in the full and just sum of $1,500, lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney; to which payment, well and truly to be made, we do bind ourselves, our successors, heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of February, 1889.

Whereas lately, in the supreme court of Pennsylvania for the middle district, to May term, 1888, No. 32, upon a writ of error to review a judgment of the common pleas of Dauphin county to March term, 1888, No, 53, wherein The Commonwealth of Pennsylvania was plaintiff and also appellant in the supreme court of Pennsylvania and The Bell's Gap Railroad Co. was defendant and appellee in the supreme court of Pennsylvania, the judgment of the court of common pleas in favor of the Bell's Gap Railroad Co. was reversed and judgment was entered by the supreme court of Pennsylvania on Feb. 4th, 1889, in favor of the Commonwealth of Pennsylvania and

against the Bell's Gap Railroad Company for the sum of $666.60, with interest and costs; and the said Bell's Gap Railroad Co. having obtained a writ of error from the Supreme Court of the United States to review said judgment of the supreme court of Pennsylvania, and having filed a copy thereof in the office of the prothonotary of said court, and having obtained a citation, directed to
35 the said Commonwealth of Pennsylvania, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October, A. D. 1889, next ensuing:

Now, the condition of this obligation is such that *is* if the Bell's Gap Railroad Company shall prosecute said writ of error with effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; else to be and remain in full force and virtue.

THE BELL'S GAP R. R. CO.,
By CHARLES F. BERWIND, *President.*
CHARLES F. BERWIND. [SEAL.]
FRANK S. LEWIS. [SEAL.]

Sealed and delivered in the presence of—

A. R. BOSLER.
J. W. M. NEWLIN.
SAMUEL BELL.

Attest: FRANK S. LEWIS.
[Seal of the Bell's Gap R. R. Co.]

I, Samuel Bell, clerk of the circuit court of the United States in and for the eastern district of Pennsylvania, in the 3d circuit, do hereby certify that the above sureties are ample and sufficient for the amount stated in the bond.

SAMUEL BELL,
Clerk of the C. C. of the U. S., E. D. of Pa.

Approved as a supersedeas bond Feb. 11th, 1889.
JOSEPH P. BRADLEY,
Associate Justice of S. C. of U. S.

36 STATE OF PENNSYLVANIA, } ss:
City of Harrisburg, }

In testimony that the foregoing, contained on pages one to 36, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in the case lately depending therein to No. 32, May term, 1888, in the middle district, wherein The Commonwealth of Pennsylvania was plaintiff in error and The Bell's Gap Railroad Company was defendant in error, I have here-

unto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this 8th day of March, A. D. 1889.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of the Middle District of the Supreme Court of Pennsylvania.

[Endorsed:] Bell's Gap R. R. Co. *vs.* Commonwealth of Pennsylvania. Error to sup. court of Pennsylvania. Transcript of record.

Endorsed on cover: Pennsylvania supreme court. No. 1497. The Bell's Gap Railroad Company, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed October 31, 1889.

No. 1497. **October Term, 1889.**

IN THE

Supreme Court of the United States

BELLS GAP RAILROAD COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA.

Error to Supreme Court of Pennsylvania.

No. 1498. **October Term, 1889.**

CITY OF CHESTER

vs.

COMMONWEALTH OF PENNSYLVANIA.

Error to the Supreme Court of Pennsylvania.

Petition for Re-argument.

JAMES W. M. NEWLIN,

For Petitioner.

BURK & MYERSTRIDGE, PRS. PHILADA.

In the Supreme Court of the United States.

CITY OF CHESTER	BELLS GAP RAILROAD COMPANY
vs.	*vs.*
COMMONWEALTH OF PENNSYLVANIA.	COMMONWEALTH OF PENNSYLVANIA.
No. 1,498. October Term, 1889.	No. 1,497. October Term, 1889.

PETITIONS FOR RE-ARGUMENT.

To the Honorable the Justices of the said Court:—

The plaintiff in error herein, by its attorney, respectfully asks for a re-argument, and in support thereof assigns the following reasons:—

In the opinion of the Court, delivered March 10, 1890, in the case of the Bells Gap Railroad Company, No 1497, October Term, 1889, it is stated:—

"The seventh objection is as follows: 'VII. The tax is void as impairing the Company's obligations to its creditors.'"

The opinion then goes on to dispose of various other questions involved in the case and not concerning "the impairment of contract;" objection, and no disposition is made of that point. It is respectfully submitted that if the decision of this Court in the case of *Murray* vs. *Charleston*, 6 Otto, page 439, is not overruled, that, then, upon that authority, the judgment of the Supreme Court of Pennsylvania in cases at bar should have been reversed, and the petitioners ask for a re-argument on this point.

And they will ever pray, etc.

The Bells Gap Railroad Company,
The City of Chester, by

JAMES W. M. NEWLIN,
their Attorney.

Office Supreme Court U. S.
FILED.
JAN 27 1890
JAMES H. McKENNEY
CLERK.

No. 1497. October Term, 1889.

IN THE

Supreme Court of the United States

BELLS GAP RAILROAD COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA.

Error to Supreme Court of Pennsylvania.

Brief on behalf of Appellant on motions to revoke allocatur, and to dismiss and affirm.

JAMES W. M. NEWLIN,
For Appellant.

BURK & MYFTRIDGE, PRS. PHILADA.

BELL'S GAP RAILROAD CO.	SUPREME COURT U. S.
vs.	October Term, 1889.
COMMONWEALTH OF PENNA.	No. 1497.

MOTION TO REVOKE ALLOCATUR AND QUASH WRIT OF ERROR.

Counter-statement of Appellant.

The Attorney-General's suggestion states [page 2, Attorney-General's brief] "that the said document purporting to be points * * * upon which the writ of error was granted was never, in fact, presented in the trial Court."

This statement is not true, and there is not a little of evidence on which to base it. The *ex parte* affidavits of the Prothonotary and his clerks, [contained on pages 12, 13, 14 of the Commonwealth's brief], are also in the nature of proof of a negative, and it is evident that the affiant's opinions, that the points were not submitted, are based on the fact that the paper in question is not endorsed by either of the affiants, as filed. That the suggestion is not true is shown, *first*, by the record itself wherein the Prothonotary of the Supreme Court of Pennsylvania certifies this particular paper, together with the rest of the record, to be "a full, true and correct copy of the record and proceedings of the Supreme Court of Pennsylvania." [Transcript, page 33.] *Second*, the affidavit of counsel for the appellant shows that this particular paper "was handed

by deponent to the Court of Common Pleas of Dauphin county, upon the trial, together with the specifications of appeal printed on pages 4, 5 and 6 of the manuscript of the record herein." * * * "These points were simply handed up to the Court on the trial, and had not been previously filed." [See appendix to this brief.]

Not only, therefore, is the allegation of the Commonwealth not supported by the facts, but that portion of the record, which is undisputed by the Commonwealth, shows that the motion is a frivolous one because it is based upon the assumption that if "the points" were not presented at the trial, the Federal questions therein raised would not be before this Court for action. On page 4, of the transcript of the record herein, there appears a paper called "appeal and specifications," which distinctly presents Federal questions, and, on page 8 of the transcript of the record herein, it appears from the stenographer's notes that upon the trial of the case, the counsel for the appellant offered in evidence this very paper, to wit: "Specifications of appeal," and this paper is referred to again in the beginning of the opinion of the trial Court, printed on page 15 of the transcript of the record herein.

How the learned Attorney-General, in view of this undisputed part of the record, can assert that the Federal questions were not raised, in the Courts below, it is difficult to understand.

JAMES W. M. NEWLIN,
Attorney for Appellant.

BELL'S GAP RAILROAD CO.	SUPREME COURT U. S.
vs.	October Term, 1889.
COMMONWEALTH OF PENNA.	No. 1497.

MOTION TO DISMISS AND AFFIRM.

Counter-statement for the Appellant.

The motion to dismiss and affirm is based upon the suppositions, 1st, that no Federal question was properly raised, 2d, that it is manifest from the record that the writ has been taken for delay, and 3d, that if any color of jurisdiction exists, the questions involved were so manifestly decided right, and are in themselves so frivolous that no argument thereof is necessary. The *first* point has been shown not to be well founded in the preceding pages of this brief. That the *second* point is shown not to be well founded by the fact that the narr or declaration of the Commonwealth in the case now before this Court was filed January 27, 1888, and the trial thereon took place within twenty-seven days, the appellant having expedited the proceedings by waiving a jury trial (transcript page 3). *Third*, that the Federal questions were

by deponent to the Court of Common Pleas of Dauphin county, upon the trial, together with the specifications of appeal printed on pages 4, 5 and 6 of the manuscript of the record herein." * * * "These points were simply handed up to the Court on the trial, and had not been previously filed." [See appendix to this brief.]

Not only, therefore, is the allegation of the Commonwealth not supported by the facts, but that portion of the record, which is undisputed by the Commonwealth, shows that the motion is a frivolous one because it is based upon the assumption that if "the points" were not presented at the trial, the Federal questions therein raised would not be before this Court for action. On page 4, of the transcript of the record herein, there appears a paper called "appeal and specifications," which distinctly presents Federal questions, and, on page 8 of the transcript of the record herein, it appears from the stenographer's notes that upon the trial of the case, the counsel for the appellant offered in evidence this very paper, to wit: "Specifications of appeal," and this paper is referred to again in the beginning of the opinion of the trial Court, printed on page 15 of the transcript of the record herein.

How the learned Attorney-General, in view of this undisputed part of the record, can assert that the Federal questions were not raised, in the Courts below, it is difficult to understand.

JAMES W. M. NEWLIN,
Attorney for Appellant.

BELL'S GAP RAILROAD CO.	SUPREME COURT U. S.
vs.	October Term, 1889.
COMMONWEALTH OF PENNA.	No. 1497.

MOTION TO DISMISS AND AFFIRM.

Counter-statement for the Appellant.

The motion to dismiss and affirm is based upon the suppositions, 1st, that no Federal question was properly raised, 2d, that it is manifest from the record that the writ has been taken for delay, and 3d, that if any color of jurisdiction exists, the questions involved were so manifestly decided right, and are in themselves so frivolous that no argument thereof is necessary. The *first* point has been shown not to be well founded in the preceding pages of this brief. That the *second* point is shown not to be well founded by the fact that the narr or declaration of the Commonwealth in the case now before this Court was filed January 27, 1888, and the trial thereon took place within twenty-seven days, the appellant having expedited the proceedings by waiving a jury trial (transcript page 3). *Third*, that the Federal questions were

neither "manifestly decided right," and that they are not "frivolous" is abundantly shown, it is submitted, by the following argument:—

Foundation of the Judgment Appealed from.

The judgment in the Supreme Court of the State was against the appellant because its Treasurer had refused to deduct, from the interest payable on its bonds, a tax claimed to be due by the bond owners to the State, and for the collection of which the appellant was held personally responsible.

Argument.

For convenience of reference, the order of the Attorney-General's brief is followed instead of that of the Assignments of Error, which were filed after the printing of the transcript of the record.

I. The Federal questions were raised in the State Court.

II. The appellant had a right to raise them.

III. The judgment appealed from was for a tax which was void under the Constitution of the United States.

(*a*) For want of notice.

(*b*) For want of an assessment.

For these reasons the proceeding was not "due process of law," and was a deprivation of "the equal protection of the laws."

(*c*) The tax impaired the obligation of the appellant's contract with its bond owners.

I. The Federal Questions were Raised in the State Courts.

The claim of the Commonwealth is for a State tax of three mills on the nominal value of the bonds issued by the appellant, which tax the Treasurer of the appellant is directed to deduct from the interest payable by the terms of the bonds to the bondowners. In order to collect this tax a settlement of account was made against appellant by the Auditor-General under the Pennsylvania Act of March 30, 1811. Purdon's Digest, page 1382, *et seq.* This Act provides that any person dissatisfied with such a settlement may appeal therefrom to the Court of Common Pleas of Dauphin county, and shall file specifications of objections to the settlement which the Court is authorized to determine thereon. Purdon's Digest, page 1386, pl. 28. In this case, such an appeal was made and specifications of objections were filed under said Act with the Auditor-General, and by him transmitted to the Court of Common Pleas of Dauphin county. The whole proceeding is based upon these specifications. The most cursory examination of them, as printed on page 4 *et seq* of transcript of the record, will show that the Federal questions were there raised in the record. This disposes of the Attorney-General's suggestion that the Federal questions were not raised, and of what is said on pages 6 and 7 of the Attorney-General's brief. The citations have nothing to do with the case, as there never is any such thing as a bill of exceptions in cases of this kind; besides, the "second conclusion of law" of the trial judge distinctly states the tax to be invalid for want of notice to the bond owner, who is the person taxed.—The treasurer only being employed as a convenient agency of the State. (Transcript, p. 21.)

Murray vs. *Charleston*, 96 U. S. Rep., 432.

In this case the opinion was delivered by Justice Strong, and on page 440 it is said, "It is objected that we have no

jurisdiction of the case because it is said that no Federal question was raised of record, or decided in the Court of Common Pleas where the suit was commenced." * * * On page 441, the Court continues as follows: "The jurisdiction of this Court over the judgments of the highest Courts of the State is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of State legislation this Court is authorized to interfere. The form and mode in which the Federal question is raised in the State Court is of minor importance if, in fact, it was raised and decided." * * *

Page 442. "The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State Court when the determination or judgment of that Court *could not have been given without deciding upon a right or authority claimed to exist under the Constitution, Laws or Treatise of the United States, and deciding against that right.* Very little importance has been attached to the inquiry whether the Federal question was formally raised." In *Crowell* vs. *Randall*, 10 Pet., 368, it was laid down after a review of almost all our previous decisions "that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment."

II. The Appellant had a Right to Raise the Federal Questions for its own Benefit.

The appellant is directly interested in the Federal question, because it is made the involuntary tax collector for the State, and is required to deduct the tax from the interest and is made a principal debtor to the State therefor. If the appellant does not raise these questions, it must pay the tax to the State, and pay it a second time to the bondowner if it should thereafter be determined that the tax is invalid.

The appellant has a right to raise the Federal question. The learned Attorney-General has quoted eight cases on page 8 of his brief to demonstrate what no one will deny, namely, that a party having no interest in the question cannot set up any title, right, privilege or immunity under the Constitution of the United States. The inference drawn from these cases is that the appellant has no right to invoke the Federal Constitution in this proceeding. This point has been decided, both by the Supreme Court of Pennsylvania and by this Court. It was contended in the State Courts that the appellant had no right to interpose objections to the tax; but the Common Pleas and the Supreme Court both overruled this objection, and held that the appellant could lawfully interpose any objections to the collection of the tax—being liable for the payment of the tax, and being principal debtor, so far as the Commonwealth is concerned. This Court, in the case of *Foreign-held Bonds*, 15 Wallace, entertained the Federal questions then raised on the appeals taken by the railroad companies, which occupy the same position as that of the present appellant. It is true that no question was raised as to the right of the corporation so to do, but the reason for this was that it was not thought such an objection was tenable. It appears, by the affidavit of the Treasurer of the appellant, transcript of the record, page 9, that the interest was paid

to the bondowners in full, and no tax was retained, consequently, the Attorney-General's suggestion that the State laws furnished a remedy to the bondowners, if any need be sought is out of the question here, because the appellant being advised by counsel that the tax was invalid, did not deduct it.

The appellant's liability is fixed before any right would exist in a bondowner to raise any question as to the validity of the tax.

III. (*A*) The Tax is Void for Want of Notice to the Bondowner.

The tax being on the bondowner, and not on the corporation, it is void, because he is given no notice, and he only knows that he has been taxed after his money has got into the State treasury. The appellant may raise this question to protect itself, because, if the tax were paid by appellant, it could not deduct it from the bondowner, *inter alia*, because that person would defend on the ground of want of notice. Want of notice makes the proceeding void, as not being "due process." This is not a specific tax, but a tax on property, and must be upon a valuation with notice.

Want of Notice.

It is manifest that so far as the bondowner is concerned he has no notice at any stage of the proceeding by virtue of which part of his interest money is impounded for the tax. The appellant is in no sense the agent of its creditors, and the so-called assessment made by the settlement appealed from, is simply a *notice* charge made against the debtor as the basis of a tax against the creditor without notice to him. It is exactly as if, in a proceeding by garnishment, it were

attempted in the attachment against the garnishee (without making the debtor a party to ascertain the amount of his debt to the plaintiff) to secure payment from the garnishee without any knowledge on the part of the debtor that anything was claimed to be due by him to the plaintiff in the attachment.

There is no pretence of notice to the taxpayer, *i. e.*, the bondowner, under any of the Acts of 1885, 1864 or 1844; and, for the cogent reasons given by the Court of Common Pleas of Dauphin county, it is submitted that this point is well taken. The question of due process of law is involved in this same point. It is an attempt upon the part of the Commonwealth to save trouble and expense, and also to reach more bonds to levy taxes on A by means of a so-called assessment to B. The tax is not on the Company, but on the resident bondowner, just the same as the Commonwealth taxes the owner of a mortgage. In such a case it has never been pretended that the owner of a mortgage, given by a private individual, could be taxed thereon through a proceeding between the Commonwealth and the mortgagor, of which the mortgagee, who pays the tax, knows nothing until the tax has been paid by his debtor deducting it from the interest and paying it to the Commonwealth, whereby his interest money is diverted from him before it has ever reached him. It seems a work of superogation to cite authorities to show that such a proceeding does not constitute "due process of law."

EXTRACTS FROM THE OPINION OF JUDGE SIMONTON, OF THE COURT OF COMMON PLEAS OF DAUPHIN CO. (transcript, 15 to 21, of No. 1498, October Term, 1889, S. C. U. S).

Page 18. "We do not consider it necessary to enter into any elaborate discussion to show that a taypayer has the constitutional right to notice an opportunity of appeal before he becomes finally bound for the tax. We shall merely refer

to a few cases and opinions of Judges on this subject out of a multitude that might be cited. The principle that, as was said by Agnew, J., in *Philadelphia* vs. *Miller*, 49 Pa. St., 448, "Notice, or at least the means of knowledge, is an essential element in every just proceeding which affects rights of persons or property," is fundamental, and is applicable to tax proceedings by its terms, because they do affect rights and persons and property."

"In tax proceedings it must be a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge is fully established against him; * * * and we should say that notice of proceedings in such cases and an opportunity for a hearing of some description were matters of constitutional right. (*Cooley on Taxation*, 265-6.)"

"Many provisions in our statutes regulating the imposition of taxes must be considered directory merely. Some are doubtless conditions such as those which are intended to secure an equality of taxation or burdens among the citizens—that is that the citizen may know for what he is taxed, know his valuation, and have notice of the time and place of appeal. *Insurance Co.* vs. *Yard*, 11 Pa. St., 338. In *Stuart* vs. *Palmer*, *supra*, a law authorizing an assessment without providing for notice and right of appeal was held unconstitutional and void. In this case the subject is fully discussed and many authorities are cited, See also *Thomas* vs. *Gain*, 35 Mich., 155 (S. C. 24, Am. R., 535); and *County of San Mateo* vs. *Southern Pacific Railroad Company*, 13 Fed. R., 722."

"The nature and form of the notice is very much in the discretion of the Legislature, but as in the act of 1844, there is no notice whatever of any kind provided for, it must in our opinion for that reason be declared unconstitutional."

Page 21–22. "That said settlement is illegal and invalid, because the laws under which it was made and under which the taxes embraced in it are claimed do not provide for any

notice to or right of appeal by the owners of the municipal loans who are claimed to be liable for the tax."

To recur to the case of a garnishee. Can it be pretended that if A has a claim against B which has not yet gone to judgment, that he can by any legerdemain issue process against C as a garnishee of B, and without making B, the principal debtor, a party, adjudicate the rights of B, ascertain the debt and secure payment thereof from the garnishee out of moneys in his hands belonging to B, who only learns what has been done when C hands over to him in lieu of his money a receipt for so much paid by him as garnishee? This very point has been decided.

Vienne vs. *McCarty*, 1st Dallas, p. 155.

"I have heard of no case which gives a creditor an action against the debtor of his debtor; there is no privity between the parties. An attachment will lie against the debtor himself, and that attachment may be laid in the hands of a third person as garnishee; but to bring the action originally against that third person is, I believe, without example, unless some particular lien appears on the goods or money in his hands."

Now, what is the difference between the cases as to the matter of notice to the principal debtor,—*i. e.*, the resident bondowner?

It is submitted that no ingenuity can suggest any distinction between the cases.

There is not even statutory notice to the bondowner. The most that has ever been contended as to statutory notice is that individual personal notice may, in certain cases, be dispensed with, if the statute gives notice to every one who can be affected by its provisions that some public officials will, under legal sanction, at a specific time and place named in the statute, perform some public act, in the

performance of which the individual citizen to be affected may, if he sees fit, attend and be heard without any further notice.

In *County of San Mateo* vs. *R. R. Co.*, 13 Fed. R., 722, Justice Field discusses the question of "due process of law," as follows:—

"No hearing upon the statement presented is allowed, and when the assessment is made, the matter is closed; no opportunity to correct any errors committed is provided. The presentation of the statement can no more do away with the necessity of allowing a subsequent hearing of the owners, than the filing of a complaint in court can dispense with a right to be heard there by the suitor and his contestant. There being then no provision of law giving to the company notice of the action of the State Board, and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the company's property in the enforcement of the tax levied according to the assessment be depriving it of its property without due process of law? It seems to us there can be but one answer to these questions. *There is something repugnant to all notion of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording to the owner any opportunity of being heard respecting the correctness of their action.*

"*Due process of law in the proceeding is deemed to be pursued when,* AFTER THE ASSESSMENT IS MADE *by the assessing officers, upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers.* Notice to him will be deemed sufficient, if the time and place of hearing be designated by the law. But, whatever the character of the proceedings, whether judicial or administrative, summary or protracted; and whether it takes property directly, *or creates a charge or liability which may be the basis of taking*

it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming, then that notice and opportunity to be heard are indispensable to the validity of the proceedings."

In *Davidson* vs. *New Orleans*, 96 U. S., 104, the Supreme Court of the United States, through Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case:—

"'That whenever, by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of the property without due process of law, however obnoxious it may be to other objections.'"

Hagar vs. *Reclamation District*, 111 U. S., 709.

"Of the different taxes which the State may impose there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent on the extent of his business), and, generally, specific taxes on things or persons or occupations. * * * Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him." * * * p. 713. "But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors

appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, and in most of the States provision is made for the correction of errors committed by them through boards of revision or equalization, sitting at designated periods, provided by law, to hear complaints respecting the justice of the assessments."

South Nashville H. R. R. Co. vs. *Morrow*, Southwestern Rep., Vol. XI, p. 354.

"The assessed bondholders being unknown are, of course, not parties to this proceeding. But inasmuch as a duty and a liability is imposed by the law upon the corporation owing these bonds, it very rightly insists that the law be construed, and its duty defined under the law." * * * "The bond is property, but it is the property of the owner —the creditor and not the debtor. It is not like a share of stock, which is not a debt but which represents the interest owned by the stockholder in the profits of a business conducted here by his agents. The owner of the bond has no interest in the business of the corporation and no control over it whatever." * * * After referring to the fact that the coupon may be owned by one person and the bond by another, whereby it will be impossible to tell whether the tax should be retained or not, the Court continues: "The burden imposed by the act, upon the corporation, with respect to the collection of the tax lawfully assessed, is too onerous and threatens gross injustice. It would have no way to secure itself against liability to either the bondholder, whose interest he has illegally retained, or to the State, for failure to reserve the tax justly due, except by requiring every coupon to be sued on. The whole scheme of the act, insofar as it undertakes to convert corporations into agencies for the collection of a tax upon their bondholders, is fatally defective and void." * * * "Notice was given to the corporation, as the agent of the

bondholder. Under the view we have taken of the act, the corporation is not the agent or representative of the bondholders, hence the assessment of these bonds as omitted property is void."

III. (*B*) The Tax is Void for Want of an Assessment.

Herein is considered also not only the lack of machinery for making any assessment, but also the necessary inequalities inherent in the "nominal value" legislative valuation.

To be very brief, the Treasurer of appellant reported that he had made no assessment and deducted no tax. The Court so found and also demonstrated that he had no power to make an assessment, and also showed that the legislative rule necessarily produced inequality of taxation.

Extract from Opinion of Judge Simonton, in Court of Common Pleas of Dauphin Co. (transcript, p. 16, *et seq*).

Page 16. "2. The actual market value of the bonds bearing interest at the rate of six per centum per annum was, during the year, included in the settlement, sixteen per centum more than the actual value of those bearing interest at four per centum and three per centum more than those bearing interest at five per centum."

Page 16. "3. * * * And we find as a fact that he made no assessment. * * * Page 17. Defendant contends that if this be the act and section under which the tax is claimed and settlement made, it cannot be sustained, because the assessment provided for is to be upon the nominal and not upon the real value of the evidences of indebtedness, and that therefore the taxes are not uniform as they are required to be by the Constitution. * * * It is undoubtedly true that the want of uniformity shown by the facts proved in that case, is

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much more glaring than that which could be inferred if the facts found in this case were alone in view; but the constitutionality of an act of Assembly cannot be determined by nor depend upon the facts proved in a particular case. If the inevitable necessary effect of administering a taxing act in the manner in which the Legislature directs it to be administered be to produce want of uniformity in the taxes, the act is unconstitutional and cannot be applied to any case. The constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done. *Stuart* vs. *Palmer*, 74 N. Y., 188."

"We need not stop to discuss the objection that the assessment is not valid without a valuation. It is alluded to in the opinion above cited, and it is, at any rate, involved in the objection of want of uniformity, for if the assessment at the nominal value result in uniformity of taxes, this result would show that it was made on a substantially correct valuation; if the necessary result is want of uniformity in the taxes, they cannot be sustained, even if such an assessment be considered a valuation." Page 18. "Defendant contends further, that if this tax be claimed under said act of 1844, it is illegal, and the act is invalid because it does not provide for notice to and right of appeal by the bondholder, and that no notice or opportunity for appeal was actually given. It is conceded that this is a tax upon the bondholder, and that it is payable by him in the first instance out of the interest due upon his bonds. He has, therefore, the same rights that other taxpayers have with respect to notice and opportunity to appeal."

There must be a Valuation.

It is affirmed as to this part of the case that, except in specific taxes and license taxes, there can be no taxation of property except by valuation, and that this valuation

must not only be made upon notice to the owner of the property sought to be taxed, but the property must be valued, like any other property, by persons having the authority of assessors, and that the legislature cannot value the property for taxation, nor can it order the assessors in all cases to value the bonds at their nominal or face value without regard to the actual value.

There are two objections to this:—

1. That the legislature is performing an executive act, to wit: making an assessment by fixing an artificial value on the property taxed, which no legislature has power to do.

2. That if it is said that the legislature does not fix a value, but merely prescribes a rule of valuation to be followed by the treasurer of the corporation, the reply is, that the rule thus prescribed makes the assessors' duties purely perfunctory and not only may, but *does necessarily produce inequality of taxation*, because all bonds, without regard to the credit of the obligor, or the rate of interest, or the time of maturity, are to be valued at their nominal or par value, and this gives rise to gross inequalities of taxation. The argument *ab inconvenienti* has no place here, and if it had it may be answered that the actual value of public and of corporation loans can be ascertained quite as readily as the value of their shares of stock, very few of which are listed on the stock exchange.

Legislature Cannot Prescribe Artificial Valuation.

A very little reflection will show that the legislature cannot, under the guise of prescribing a rule of valuation, give to any kind of property an artificial value for the purpose of taxation.

This is a proposition that will bear scrutiny, and the more it is considered the more thoroughly its truth will demonstrate itself.

It needs neither a prophet nor the son of a prophet to point out the endless incongruities which log-rolling would produce in the revenue laws, if the legislature, in what they might be pleased to term a general revenue law, were permitted to call an incongruous division of property a class, and then put artificial value on it—a sort of *fiat* assessment.

Railroad Co. vs. *Commissioners*, 75 N. C., 475, it was held that the legislature of North Carolina had no power to enact that the State Board of Equalization in valuing railroad property should not make it less than $8,000 per mile. The Court say:—

READE, J: "The Constitution, Article V, Section 3, provides that all property, real and personal, shall be taxed by a 'uniform rule' according to its 'true value in money.'"

"The statute (1874-75, Chapter 184, Section 3) provided that 'railroad beds shall be given in the counties where they lie, and that they shall not be valued at less than $8,000 per mile."

"Now, if the Legislature were to enact that every man's land shall be valued at eight dollars per acre without regard to its *real* value, *its* conflict with the Constitution would be manifest. And so if it provided that no man's land should be valued at less than eight dollars per acre, although it be worth much less."

"We have to declare, therefore, that the aforesaid statute under which the defendants made the valuation of the road bed, as we infer from their letter to the plaintiffs, is unconstitutional."

This same point was decided in California in the case of *People* vs. *Hastings*, 34 Cal., 571. It is there laid down that "the Legislature cannot make the original valuation, or authorize any other officer than the assessor to make it. The Legislature may prescribe the mode of making it."

Indeed, acts imposing taxation on property, and undertaking by legislation to fix an imaginary value, are not legislation or taxation, but are confiscation.

If the Legislature can say that the bond of a private individual when taxed to its owner shall be assessed at its real value, and that the bond of a corporation shall be taxed at its nominal value, then there is no limit to the legislative power in this regard. And it might prescribe as well for local as for State taxation on the same basis. It might say

that all frame houses shall pay a tax of $5 per annum, and all brick houses $10 per annum; or it might say that a one-story house should pay one rate and a two-story house another; or it might say that all farms must be assessed at $50 an acre, and all horses at $50 a piece.

Indeed, there is no end to the legislative vagaries that could be indulged in, if the legislature be permitted to value property for taxation. Property that it desires to protect may be favored in some such way as this. The legislature may say that moneys invested in the purchase of bonds and mortgages of individuals shall be taxed at one-half of their nominal value, and bonds and mortgages made by corporations shall be taxed at their full value or their par value.

When it is objected to the tax that it is lacking in uniformity, it is replied that the uniformity requirement of the Constitution is complied with, because there is a uniform *rule* of taxation laid down by the statute. But this is obviously mistaking words for things, and the shadow for the substance. The object is that each citizen shall contribute according to his means to the public burden. Now what are his means? Obviously the value of his property. Can it be said that A, being the owner of $100,000 of corporation bonds of the nominal value of $100,000, but really worth in the market $150,000 contributes to the support of the Government according to his means when he pays a three-mill tax upon $100,000, whilst B, owning bonds of the nominal value of $100,000, and worth in the market but $50,000, likewise pays three mills upon $100,000? Is it not entirely clear that under this uniform *rule* of taxation B is taxed just three times as much as A upon every $1,000 of actual taxable values owned by him? The argument is puerile in the extreme; and yet that such is the case is not the fault of the learned Attorney-General, but of the Legislature which has called upon him to perform the impossible task of demonstrating that black is white. Indeed, this theory that uniformity of rule satisfies the constitutional

requirement without any regard to the necessary inequalities of the public burdens which it produces, cannot possibly be sustained. It is easy to reduce the proposition to an absurdity; and, indeed, he has done so himself in the argument of this very case, by contending that the Legislature may comply with the constitutional requirement of making taxes either "uniformly *ad valorem*," or making them, as to some classes of property, "uniform specific taxes" upon an assumed analogy to license taxes! And following the same thought, the Commonwealth's officer has contended that municipal bonds may be classified for taxation as a distinct class, and, provided there is uniformity in the class, the taxation is valid, and that such is the case here.

Now observe what this leads to. The Legislature may say that the bonds given by individuals to accompany mortgages executed by them shall constitute one class, and shall be taxed directly to the mortgagor upon notice to him, and at the actual value of the security; but that corporation bonds accompanying corporation mortgages shall constitute another class, and shall be taxed to the bondowner without notice, upon an assessment made through the mortgagor, and not upon ascertainment of the real value of the security, but upon its face value. Is it not clear at a glance that this is not a classification of subjects of taxation, but, on the contrary, a mere arbitrary exaction of a specific sum of money without notice, and without regard to how unequally it apportions the public burdens upon the property in question? The object of classification is to produce uniformity, and not to destroy it; and to have regard both to this and to the convenience of the Government officials in the details by means of which the public burdens are to be ascertained and collected. And the classification must always be founded upon an essential difference in the subjects of taxation, which is not the case here, because it is just as easy to value corporation bonds as it is to value corporation stocks or the bonds of private individuals; and

a valid assessment may be provided for upon notice to the taxpayer in one case as readily as in the other.

It is true that a tax is valid notwithstanding in its practical enforcement the assessors, through mistakes of judgment, have not produced uniformity of burden. But in all these cases, the citizen had notice and an opportunity to be heard, and the tribunal which heard him, through human infirmity, made a mistake in judgment. The same thing occurs continually in ordinary judicial proceedings.

But this is a totally different thing from an inequality which does not arise from a mistake of judgment, but is the necessary consequence of a legislative requirement to tax at par, irrespective of real value, and leaving nothing to the judgment of the assessors, providing no notice to the taxpayer, and *taking his money before it reaches him.*

There is nothing but a simple legislative *fiat* directing the treasurer of the Company to "assess" the bonds at their nominal value at any time during the fiscal year.

On this point and want of "due process of law" under the Fourteenth Amendment to the Constitution of the United States, the following cases are referred to:—

Brown vs. *Hummel*, 6 Barr., 90.

Dartmouth College Case, 4 Wheaton, 581 (Webster's definition).

Stuart vs. *Palmer*, 74 New York, 191.

County of San Mateo vs. *R. R. Co.*, 13 Fed. Rep., 722.

Davidson vs. *New Orleans*, 6 Otto, 104.

Hobbs vs. *Commissioners*, N. E. Rep., Vol. 3, p. 263.

Hurtado vs. *California*, 110 U. S., 535.

In re Lake South Rep., Vol. 3, p. 479.

Strode vs. *Washer*, 16 Pacific Rep., 928.

Hutson vs. *Woodbridge*, 16 Pacific Rep., 549.

The only answer which the Supreme Court of Pennsylvania gives to the objection of want of assessment and want of notice is that neither is necessary, because the tax is a specific one, *and* that the Legislature may fix the value!

Now, in specific taxes, there are no valuations, hence there has been held to be no necessity for notice, as there is nothing to value and nothing to object to.

But, aside from the fact that there cannot be such a thing as a specific tax on corporation bonds, the statute negatives the idea that it is intended to impose a specific tax on bonds. On the contrary, the entire statute imposes taxes on property, and, in the case of bonds, goes through the form of having a valuation by providing that the Treasurer of the corporation shall make an assessment, but requires him to make it at par, and the statute allows the Treasurer a commission of five per cent. for making the assessment and deducting the tax from the interest.

In the case of *San Mateo County* vs. *The Southern Pacific Railroad*, *ut supra*, Field, J., discusses the question at great length, and in a very powerful opinion holds that inequality in taxation is a denial of "the equal protection of the laws," and is therefore within the inhibition of the Fourteenth amendment.

Field, Justice (Sawyer, Circuit Judge, concurring):—

"The concluding clause of its first section was designed to cover all cases of possible discrimination and partial legislation against any class, in ordaining that no State shall deny to any person within its jurisdiction the equal protection of the laws. Equality of protection is thus made the constitutional right of every person; and this equality of protection implies not only that the same legal remedies shall be afforded to him for the prevention or redress of wrongs and the enforcement of rights, but also that he shall be subjected to no greater burdens or charges than such as are equally imposed upon all others under like circumstances. No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens. Property may, indeed, be classified, and different

kinds be subjected to different rates. Real property may be taxed at one rate, and personal property at another. Property in particular cases may be taxed for local purposes, while property situated elsewhere is exempt. License taxes may also vary in amount, according to the calling or business for which they are exacted. But arbitrary distinctions, not arising from real differences in the character or situation of the property, or which do not operate alike upon all property of the same kind similarly situated, are forbidden by the amendment. Equality in the imposition of burdens is the constitutional rule as applied to the property of individuals, where it is subject to taxation at all; and this imports that a uniform mode shall be allowed in the estimate of its value, and that the contribution exacted shall be in some uniform proportion to such value prescribed according to the nature or position of the property. All State action, constitutional or legislative, infringing upon the enforcement of this rule, must give way before it."

In comment on an instance similar to that suggested above, Judge Sawyer, in *County of Santa Clara* vs. *Southern Pacific R. R. Co.*, 18 Fed. Rep., 433, said:—

"A mere change of ownership, under the provision in question, largely affects the amount of taxes paid by the owner upon the same property, without any change in the character, condition, value, use or circumstances of the property itself. A provision that a black man shall pay double the amount of taxes paid by a white man on the same kind of property similarly situated and used, or upon the identical property, in consequence of a mere change of ownership from a white man to a black man, might, with as good reason, be sustained on the principle of classification invoked. The classification in this case is clearly by ownership, and not by condition or use."

In an elaborate discussion of the principles of classification in the same case, Justice Field said: "The principle

which sanctions the elimination of one element in assessing the value of property held by one party and takes it into consideration in assessing the value of property held by another, would sanction the assessment of the property of one at less than its value—at half or quarter of it—and the property of another at more than its value—at double or treble of it—according to the will or caprice of the State. * * * The principle which justifies such a discrimination in assessment of taxation where one of the owners is a railroad corporation and the other a natural person would also sustain it when both owners are natural persons. A mere change in the State Constitution would affect this if the Federal Constitution does not forbid it. Any difference between the owners, whether of age, color or race, or sex, which the State might designate would be a sufficient reason for the discrimination. * * * A classification of value for taxation upon any such principle would be abhorrent to all notions of equality of right among men. Strangely indeed would the law sound in case it read, that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors. * * * There undoubtedly are, and always will be, more or less, inequalities in the operation of all general legislation, arising from the different conditions of persons, from their means, business or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully-devised scheme to produce such inequality, or a scheme, if not so devised, necessarily producing that result."

Boundary Assessment vs. *Alabama Central R. R.*, 59 Ala., 551.

"The General Assembly cannot declare an artificial value of property."

"The Constitution does not authorize the Legislature to prescribe or declare an arbitrary or artificial value of property or individuals or corporations, and assess taxes on such valuations." "If the Legislature had declared that all railroads should be taxed as if the value of the road was so much per mile; or that all lands should be taxed as if they were of a particular value per acre, there would be no discussion of the question that legislative power had been transcended. What real difference is there between such an enactment and an enactment like the present—that the net earnings of a railroad shall be regarded as eight per cent. of the value of its property? Why say eight per cent? True, eight per cent. is the legal rate of interest, but is it consequently a legal standard, or a practical standard of the value of property, when such property will produce, by way of income, that sum? Property which will produce only that income will but rarely find a purchaser who will invest in it for the purpose of obtaining interest only. The rate of interest is not a standard of the value of the property, but the measure of damages fixed by law for the forbearance of a debt, the loan of money, or its detention after the date it should have been paid."

See *People* vs. *Hastings*, 29 Cal., 449.

The Legislature cannot declare an artificial value of property for taxation, such an act would be unconstitutional.

State of Nevada vs. *Estabrook*, 3 Nev., 179.

Here a section of a Revenue Act directed that a tax be levied on three-fourths of the value, previously ascertained, of the proceeds of the mine. It was held that this was unconstitutional, *the Court* saying:—"The value once being ascertained, the whole value is taxable at the same rate as all other property."

Danville vs. *Shelton*, 76 Va., 325.

While under the Virginia Constitution a city may levy a tax; it must be equal, uniform and upon an *ad valorem* basis.

An attempt, therefore, to tax those engaged in the business of purchasing leaf tobacco, fifteen cents on each one thousand pounds without regard to value is illegal.

Assess. Board vs. *Alabama Cent. R. Co.*, 59 Ala., 551.

The constitution does not authorize the Legislature to prescribe or declare an arbitrary or artificial value of the property of individuals or corporations, and assess taxes on such valuation.

The Code establishes a rule for the valuation of railroad property, for the purposes of taxation, which is not authorized by the Constitution, and therefore the assessment of taxes made in obedience to it is invalid, and was properly vacated by the court.

Pickard vs. *Pullman, etc., Co.*, 117 U. S., 43.

"The tax was not a property tax because, under the Constitution of Tennessee, all property must be taxed according to its value, and this tax was not measured by value, but was an arbitrary charge."

People vs. *Lothrop*, 3 Colo., 456.

The power to determine the valuation of taxable property is lodged in the assessors and boards of county commissioners.

III. (*C*) THE TAX IS VOID, BECAUSE IT IMPAIRS THE CORPORATION'S OBLIGATIONS TO ITS CREDITORS.

The learned Attorney-General has not carefully read the case of *Murray* vs. *Charleston*, 96 U. S., 432. If he had, he would have found that this case is on all fours with the one at bar, because it was decided on the broad, general principle, without any regard to the question of non-residence of the bondholder; and, indeed, the reasoning in the case of State Tax on Foreign-held Bonds, 15 Wallace, 320, is not confined to the single question of non-residence. The cases

of *Haight* vs. *The Railroad*, 6 Wallace, page 15, and *U. S.* vs. *The Railroad Company*, 17 Wallace, 322, have no possible application to the point under discussion. Both of these cases were decided by this Court before the case of *Murray* vs. *Charleston*, and are nowhere referred to in that decision, for the obvious reason that they were not in point. The prohibition in regard to laws impairing the obligation of contracts is laid upon the States, and as these cases were under the Federal Revenue Act, no such question could arise, and no question was raised as to assessment or notice. It was simply the case of a sovereignty seizing a certain amount of money which it was in a position to get, and as to which it was not subject to the restrictions binding on the State governments. The same may be said of the case of the Savings Bank against the United States, 19 Wallace, 227 and 240.

Sinking Fund Cases, 99 U. S. Rep., 718.

Waite, C. J., speaking of the United States, says: "They "are not included within the constitutional prohibition "which prevents States from passing laws impairing the "obligations of contracts."

State Tax on Foreign-held Bonds, 15 Wallace.

The following language is to be observed on page 326: "A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State."

To return to the case of *Murray* vs. *Charleston*, 96 U. S., p. 448. The Court disclaim resting the decision on the non-residence of the bondowner.

Page 448. "We do not care now to enter upon the consideration of the question whether a State can tax a debt due by one of its citizens or municipalities to a non-resident creditor, or whether it has any jurisdiction over such a creditor or over the credit he owns. Such a discussion is

not necessary, and it may be doubtful whether the question is presented to us by this record. * * * There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this Court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts and the duty of performing them as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the greatest objects for which the Constitution was framed."

The appellant agreed with its bondholder to pay four, five or six per cent. interest.

When he comes to get his interest he is asked to be satisfied with less, because the Legislature has so willed. He is not satisfied and demands his full interest.

The Commonwealth's answer is that the tax is due from the residents, and therefore it is valid for the treasurer to deduct the amount thereof from the interest; but, aside from the fact that this argument begs the question, the Commonwealth can only tax the bonds owned by residents by an assessment against the creditors owning the bonds, and not against the debtor. This interest money, as soon as it is set apart for the payment of the bondowner, becomes and is his individual property, and *when it reaches him* then the Commonwealth may tax it; but, until it reaches him and becomes a part of his estate, it cannot be taxed to him indirectly.

Murray vs. *Charleston*, 96 U. S. Rep., p. 444.

* * * "A change of the express stipulation of a contract or a relief of a debtor from strict and literal compliance with its requirements can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State Legislature. The constitutional provision against impairing contract obligations is a

limitation upon the taxing power as well as upon all legislation, whatever form it may assume. Indeed, attempted State taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls the exercise of our supervisory power. It may then safely be affirmed that no State, by virtue of its taxing power, can say to a debtor, 'you need not pay to your creditor all of what you have promised him. You may satisfy your duty to him by retaining a part for yourself or for some municipality or for the State Treasury.' Much less can a city say, 'We will tax our debt to you, and in virtue of the tax withhold a part for our own use.'"

"What, then, is meant by the doctrine that contracts are made with reference to the taxing power resident in the State and in subordination to it? Is it meant that when a person lends money to the State or to a municipal division of the State having the power of taxation, there is in the contract a tacit reservation of a right in the debtor to raise contributions out of the money promised to be paid *before* payment? That cannot be, because if it could, the contract (in the language of Alexander Hamilton) would 'involve two contradictory things: an obligation to do, and a right not to do; an obligation to pay a certain sum, and a right to retain it in the shape of a tax.'

"It is against the rules, both of law and of reason, to admit by implication, in the construction of a contract, a principle which goes in destruction of it. The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of their being in the undertaking of a State or city to pay a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

"Is, then, property which consists in the promise of a State or of a municipality of a State beyond the reach of taxation? We do not affirm that it is. A State may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched; *but until payment of the debt or interest has been made as stipulated, we think no act of State sovereignty can work an exoneration from what has been promised to the creditor; namely, payment to him, without a violation of the Constitution.* 'The true rule of every case of property founded on contract with the government is this: *It must first be reduced into possession*, and then it will become subject in common with other similar property to the right of the government to raise contributions upon it. It may be said that the government may fulfil this principle by paying the interest with one hand and taking back the amount of the tax with the other. But to this the answer is that to comply truly with the rule *the tax must be upon all the money of the community*, not upon the particular portion of it which is paid to the public creditors, and it ought beside to be so regulated as *not to include a lien of the tax upon the fund.* The creditor should be not otherwise acted upon than *as every other possessor of money:* and consequently the money he receives from the public can then only be a fit subject of taxation when it is entirely separated (from the contract) and thrown undistinguished into the common mass,' 3 Hamilton Works, 514 *et seq.* Thus only can contracts with the State be allowed to have the same meaning as all other similar contracts have."

This was following *State Tax on Foreign-held Bonds*, 15 Wall, 320, in which it is said:

"But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors and only possess value in

the hands of the creditors. *With them they are property and in their hands they may be taxed.* To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations belongs to the creditors to whom they are payable, and follows their domicile wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways and supported by citations from numerous adjudications, but no number of authorities and no forms of expression could add anything to its obvious truth which is recognized upon its simple statement.

"*The bonds* issued by the Railroad Company in this case *are* undoubtedly *property*, but property *in the hands of the holders*, not property of the obligors. * * *

"*A law which alters the terms of a contract by imposing new conditions* or dispensing with those expressed is a law which *impairs its obligation*, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract and it prevents their legal enforcement. *The Act of Pennsylvania of May* 1, 1868, *falls within this description.* It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent. upon every dollar and pay it into the treasury of the Commonwealth. *It thus sanctioned and commands a disregard of the express provisions of the contracts between the Company and its creditors.* It is only one of many cases where, under the name of taxation, *an oppressive exaction is made without Constitutional warrant, amounting to little less than* an arbitrary seizure of private property."

Hartman vs. *Greenhow*, 102 U. S. Rep., page 683.

On the other hand it is urged that the bonds of every State are property in the hands of its creditors and as such that they should bear a due proportion of public burdens.

In the case of *Murray* vs. *Charleston*, 96 U. S., 432, there are many pertinent and just observations on this subject which it is not material to repeat, for the question is not material to repeat, for the question is not necessarily involved in the disposition of the case before us. Whatever may be the wise rule—looking at the necessity in a commercial country for its prosperity that its public credit should never be impaired—as to the taxibility of the public securities it is settled that any tax levied upon them cannot be withheld from the interest payable thereon. Such was the decision of this Court in *Murray* vs. *Charleston*. (Non-residence question not referred to.)

* * * "Its power of taxation must be exercised, being a political agency of the State in subordination to the inhibition of the Federal Constitution against legislation impairing the obligation of contracts. *Until the interest was paid no act of the State or of its political subdivisions exercising legislative power by its authority could work an exoneration from what was promised to the creditor.*"

* * * "Here also the coupons held by the petioner were distinct contracts imposing separate obligations upon the State. He was not the owner of the bonds to which they had been originally attached. In his hands they were as free and discharged from all liability on those bonds as though they had never been connected with them. And surely it is not necessary to argue that an Act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an Act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another. * * * The Act of 1876 declares that the coupons shall not be thus received for taxes and dues owing by holders of them for their full amount, but only for such portion as may remain after a tax subsequently levied upon the bonds to which they were originally attached is deducted, though the bonds

be held by other parties. * * * If against the express terms of the contract the State can take a portion of the interest in the shape of a tax on the bond, it may, at its pleasure, take the whole."

REVIEW OF SOME CITATIONS OF THE ATTORNEY-GENERAL.

Haight vs. *R. R. Co.*, 6 Wallace, 15.

Haight, a resident of New York, owned bonds of defendant from the interest on which the Company had deducted five per cent. for a federal tax which the Court held to be an income tax, payable by Haight. No question of assessment or notice was raised, nor of impairment of contract, but the only question litigated was this: Did the Company agree with Haight to pay this tax for him? The Court held that it did not.

This case is not referred to in *Murray* vs. *Charleston*.

U. S. vs. *R. R. Co.*, 17 Wallace, p. 332.

This follows *Haight* vs. *R. R. Co.*, 6 Wallace, 15, but decides that bonds of the railroad company, owned by the city of Baltimore, are not subject to federal taxation, and that consequently the United States could not recover against the Company. This case is not referred to in *Murray* vs. *Charleston*.

National Bank vs. *Commonwealth*, 6 Wallace, 353.

The tax here sustained was expressly authorized by the National Banking Act, which was in itself the charter of the bank, and consequently the shareowners took their stock with this liability written into the certificates.

Savings Bank vs. *United States*, 19 Wallace, 227.

The bank had added a certain amount in cash to its surplus, and the act of congress made it taxable at five per cent. This case simply affirms that the tax could be collected from the bank by an ordinary action of debt without an assessment.

It is to be observed, however, that the tax was on money (*Bank* vs. *U. S.*, 19 Wallace), and therefore no assessment was necessary, as it necessarily furnishes its own valuation. Besides, the bank had notice and an opportunity to be heard to contest the validity of the tax, all of which requirements are wanting in the case at bar.

Nevertheless, on page 241, a vigorous dissent by Trustees Bradley and Field is recorded, because there had been no assessment made as a foundation for the tax.

United States vs. *Ferary*, 93 U. S., p. 625.

This was the case of a tax on a distiller, rated according to the capacity of the distillery, and simply holds that the survey, until changed, is conclusive. The Court say, page 628, "and such capacity is ascertained, and information of "it is given to the distiller before he commences his manu- "facture."

King vs. *United States*, 99 U. S., p. 229.

This case affirms *Dollar Savings Bank* vs. *U. S.*, 19 Wallace, 227. The only point before the Court was this: A revenue collector had received a tax from a railroad company, which, it was claimed, had not been assessed to it, and, having failed to return it to the United States Treasury, his sureties contended that they were not liable therefor.

U. S. vs. *Erie Railway Co.*, 107 U. S., p. 1. See, also, 106 U. S., 327.

Here the company was liable to a tax of five per centum to the United States on all interest paid on its bonds, and it was held that this might be collected by suit under *Dollar Savings Bank* vs. *U. S.*, 19 Wallace, p. 700.

JAMES W. M. NEWLIN,
Attorney for Appellant.

APPENDIX.

BELLS GAP RAILROAD COMPANY
vs.
COMMONWEALTH OF PENNSYLVANIA.

SUPREME COURT U.S.
October Term, 1889.
No. 1497.

CITY AND COUNTY OF PHILADELPHIA, *ss.*

James W. M. Newlin, being duly sworn according to law deposes and says that the paper called "points," and referred to in the petition of the appellant for an allocatur for a writ of error from the Supreme Court of the United States (transcript of record, page 17), was handed by deponent to the Court of Common Pleas of Dauphin county, upon the trial, together with the specifications of appeal, printed on pages 4 and 5 of the transcript of the record herein, which specifications of appeal were filed January, 1888, as appears by the docket entries, page 3, and were also formally offered in evidence on the trial (see page 8 of the record). These points were simply handed up to the Court on the trial, and had not been previously filed, and it was unnecessary, according to the practice of the Court, to have had said paper marked, filed by the Prothonotary.

Deponent further says that shortly after the writ of error was allowed herein, he requested the Attorney-General to make a motion in this court to advance the cause so that it might be heard without delay.

JAMES W. M. NEWLIN.

Sworn and subscribed before me, this 23d day of January, A. D. 1890.

JOSEPH V. GALLAGHER,
Notary Public.

[SEAL.]

Office Supreme Court U.S.
FILED
JAN 23 1890
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

BELL'S GAP RAILROAD COMPANY

VS.

Commonwealth of Pennsylvania.

No. 1497, October Term, 1889.

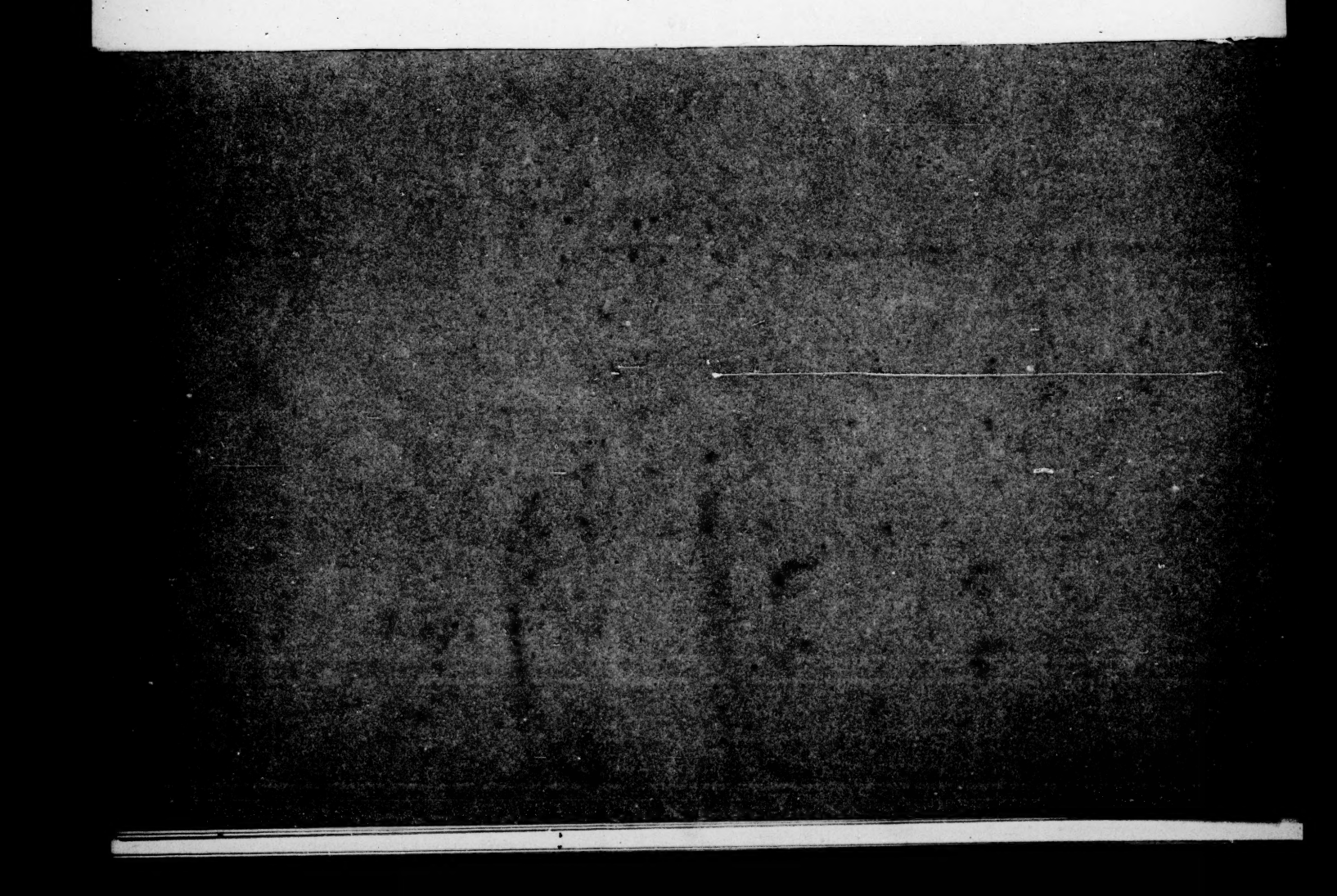
Error to the Supreme Court of Pennsylvania.

MOTIONS:

1. **To revoke the *allocatur* and quash the writ of error.**
2. **To dismiss the cause.**
3. **To affirm the judgment below.**

MOTIONS AND BRIEF ON BEHALF OF THE COMMONWEALTH OF PENNSYLVANIA.

JOHN F. SANDERSON,
Deputy Attorney General.
WILLIAM S. KIRKPATRICK,
Attorney General.



In the Supreme Court of the United States

BELL'S GAP RAILROAD COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA.

No. 1497, OCTOBER TERM, 1889,

Error to the Supreme Court of Pennsylvania.

MOTION TO REVOKE ALLOCATUR AND QUASH WRIT OF ERROR.

And now, January 27, 1890, comes the Commonwealth of Pennsylvania, by her Attorney General, William S. Kirkpatrick, into court, and causes the court here to understand and be informed:—

That the plaintiff in error, the Bell's Gap Railroad Company, appeared by counsel on the 11th day of February, 1889, before the Honorable Joseph P. Bradley, one of the Associate Justices of this Court, and presented its petition addressed to this honorable Court, praying for the allowance of a writ of error to the Supreme Court of Pennsylvania, and setting forth that, upon the trial of the cause, in which the judgment in question was rendered, in the

trial Court, to wit, the Court of Common Pleas of Dauphin county, the petitioner, the said Bell's Gap Railroad Company, submitted to the said Court of Common Pleas of Dauphin county, certain points wherein the said petitioner specially set up and claimed certain rights, privileges and immunities under the Constitution of the United States, which points were negatived by the said Court of Common Pleas of Dauphin county, but that the cause was decided in favor of the petitioner upon other grounds arising under the Constitution of Pennsylvania, and that, thereupon, the Commonwealth of Pennsylvania took a writ of error to the Supreme Court of Pennsylvania, upon which the said Supreme Court reversed the judgment of the said Court of Common Pleas of Dauphin county, and ordered judgment to be entered in favor of the Commonwealth of Pennsylvania against the petitioner.

The said petitioner further set forth as follows:

Your petitioners further show that the said judgment of the said Supreme Court of Pennsylvania is a judgment of the highest court of record of the Commonwealth of Pennsylvania; that the judgment of the said court is final; that the right, title, privileges and immunities claimed by your petitioners, defendants and appellees aforesaid, were claimed under the Constitution of the United States, particularly set forth in the points of charge as so submitted in the Court of Common Pleas of Dauphin county, as hereinbefore particularly set forth; that Article III, Section 8, of the Constitution of the United States provides that the judicial power of the United States shall extend to all cases of law and equity arising under the Constitution and laws of the United States referring to the said subject matters, all of which appears of record; that the decision and judgment of the Supreme Court of Pennsylvania aforesaid was against the right, title, privilege and immunity so claimed by your petitioner under the Constitution of the United States.

And the said Attorney General further causes the Court here to understand and be informed, that it is not true that points of charge, setting up any such right, title, privilege or immunity, or, in fact, any points of charge, were submitted by the said petitioner on the trial of said case in the said Court of Common Pleas of Dauphin county; and that

no such points of charge, or any paper purporting to be such points of charge, are contained in the record of the said case or among the papers returned therewith.

That upon the said petition, so as aforesaid presented, the Honorable Joseph P. Bradley, Associate Justice of this honorable Court, did, on the 11th day of February, 1889, grant the prayer of the petitioner and allow a writ of error from this honorable Court to the Supreme Court of Pennsylvania, which writ of error, together with the record of the case, not accompanied, however, by assignments of error, was docketed in this Court to No. 1497, October Term, 1889, on the 31st day of October, 1889, and the said Attorney General for the said Commonwealth, in support of the matters above stated, doth refer to the transcript of the said record herewith submitted and to the said petition printed in said transcript on pages 15-19 thereof, and to the affidavits of the Prothonotary and Deputy Prothonotary of the Court of Common Pleas of Dauphin County, printed in the Appendix hereto, p. 12, 13.

And thereupon, the said Commonwealth by her Attorney General, doth move the Court here to revoke the allowance of the said writ of error as having been improvidently granted by reason of the untrue statements in said petition contained, and to quash the writ of error issued pursuant thereto.

WILLIAM S. KIRKPATRICK,
Attorney General.

In the Supreme Court of the United States.

No. 1497, OCTOBER TERM, 1889.

BELL'S GAP RAILROAD COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA.

Error to the Supreme Court of Pennsylvania.

MOTIONS TO DISMISS AND AFFIRM.

And now, January 27, 1890, comes the Commonwealth of Pennsylvania, by her Attorney General, William S. Kirkpatrick, and moves the Court here to dismiss this case for want of jurisdiction on the ground that the record thereof, herewith produced and shown to the Court, fails to show that there was drawn in question in the case the validity of a treaty or statute of or an authority exercised under the United States, and a decision against such validity, or that there was drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and a decision in favor of their validity, or that any title, right, privilege or immunity was claimed under the Constitution or any treaty or statute of or commission held, or authority exercised, under the United States, and a decision against the title, right, privilege or

immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, and the said Attorney General further moves the Court here to affirm the judgment in this case on the ground that it is manifest from the record that the writ has been taken for delay, and that if any color of jurisdiction exists, the questions involved were so manifestly decided right, and are in themselves so frivolous, that no argument thereof is necessary.

WILLIAM S. KIRKPATRICK,
Attorney General.

BRIEF ON MOTIONS TO DISMISS AND AFFIRM.

It is the settled doctrine of this Court that to give jurisdiction under section 709 of the Revised Statutes, because of a denial by a State Court of any right, title, privilege or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way. To be reviewable the decision must be against the right so set up or claimed, and where the Supreme Court of a State reviews the decision of the trial court it must appear that the claim was made in that court, because the Supreme Court is only authorized to review the judgment for errors committed there, and this Court can do no more. This is substantially the language of Chief Justice Waite in *Spies* v. *Illinois*, 123 U. S. 131, 181.

The proposition, in substantially the same language, was affirmed in *Brooks* v. *Missouri*, 124 U. S. 394, and in *Chappell* v. *Bradshaw*, 128 U. S. 132.

In this case no matter of law or fact appears of record by points submitted by the defendant, the Bell's Gap Railroad Company, in the trial court, or by bills of exception taken there at the instance of said defendant. The case was tried under the act of Assembly of Pennsylvania of 22d April, 1874, printed in the appendix hereto, page 14. The practice under that act is similar to that under a like statute of the United States, as is shown by Brightly's Troubat & Haley's Practice, page 408, where the Federal decisions are quoted in illustration of the practice under the Pennsylvania law.

Said the Supreme Court of Pennsylvania in *Commonwealth* v. *Lehigh Valley Railroad Company*, 8 Out. 97:

This Court, under the ruling of Jamison *v.* Collins, 2 Norris, 359, and Lee *v.* Keys, 7 Norris, 175, can hear and

determine only questions of law, arising upon bills of exception to the rulings of the judge, relating to the evidence, or to the law of the case; we cannot go behind his findings of fact, except where in a common law trial before a jury. the assignment of error is such as can be heard and determined by this Court; the writ of error brings up no question as upon motion for a new trial.

In *Miller* v. *Dunlap*, 21 Weekly Notes Cases, 285, the Supreme Court of Pennsylvania said:

"The Act of 14 May, 1874, provides that the duties of a referee in the trial and decision of a cause shall be the same as those of the court under a similar submission. The duties of the court where trial by jury is waived and the questions of fact and law are submitted to the decision of the court, are regulated by the act of 22 April, 1874. * * * In this mode of trial the findings of fact stand in the place of a verdict and will not be disturbed except for manifest error. The answers to the points and the conclusions of law stand in lieu of the judge's charge to the jury. The questions of fact and law are thus clearly separated as in trials where the facts are decided by the jury. * * * After a clear statement of the facts found and the legal conclusions reached, an argument in support of any one or more of these is quite in place; but the requirement of the statutes does not extend beyond the separate and distinct statement of the facts found and the rules of law applicable thereto."

The foregoing is a clear definition of what constitutes the record of the trial in the trial court. If the exceptions taken on behalf of the Commonwealth in the Court below are looked into to ascertain any further points involved, no Federal question will appear from them, nor will any Federal question appear in the assignments of error in the Supreme Court of Pennsylvania, because these assignments embrace no more than what was involved in the exceptions taken by the Commonwealth in the Court below.

The motion to affirm is based upon the settled doctrine of the court that a cause ought not to be held for argument where the Federal question, on which jurisdiction depends, was manifestly decided right.

Transportation Line v. *Cooper*, 99 U. S. 78.
Micas v. *Williams*, 104 U. S. 556.

Swope v. *Leffingwell*, 105 U. S. 3.
New Orleans Ins. Co. v. *Albro Co.*, 112 U. S. 506.
Church v. *Kelsey*, 121 U. S. 282.
Arrowsmith v. *Harmoning*, 118 U. S. 194.
Spies v. *Illnois*, 123 U. S. 131.

The questions sought to be litigated by the plaintiff in error, as shown by the petition for the allocatur, independently of the untrue allegation respecting the points, have been so often pressed upon the attention of the Court, and so often determined adversely, that the rules must be regarded as settled and the questions not entitled to further hearing.

Walston v. *Nevin*, 128 U. S. 578.

That the motion is thus well-founded will appear from a statement of the questions sought to be litigated and the former decisions of this court upon them.

The tax in question is demanded pursuant to the Act of Assembly of Pennsylvania of June 30, 1885, material parts of which are printed in the appendix hereto, page 15. The first section defines the taxable subject, to wit: money at interest, and fixes the rate. Other sections provide the methods of collecting and assessing the tax. As to moneys at interest due from private corporations, the tax is collected under the fourth section, which provides that the tax shall be deducted by the corporation, through is proper officer, from the interest, when interest payments are made to the holder of the obligation. being a resident of the State, and returned by the corporation to the State Treasury. The tax thus collected is three mills annually upon the nominal or face value of the obligation on which interest is paid. See Section 4, Act June 30, 1885, appendix hereto, page 15.

This tax is objected to:

First. Because it is alleged no assessment is provided for.

Second. Because no notice to or hearing of the taxable person is provided for.

Third. Because the tax impairs the company's obligation to its creditors.

These objections are thus answered:

1. The Legislature has rightfully fixed the rate as applied to the taxable subject, and no assessment or valuation is required to ascertain the amount of the tax.

In *Savings Bank* v. *United States*, 19 Wallace, 227, 240, it was decided that a suit at law might be maintained for the recovery of the tax on interest paid, even though no list had been returned and no assessment made, and in the opinion it was said:

> No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by designated officers or by the law itself. In the present case the statute required every savings bank to pay a tax of five per cent. on all undisturbed earnings made, or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank, and without more, it made the bank a debtor.

This ruling was distinctly affirmed in *King* v. *United States*, 99 U. S. 229, and in *United States* v. *Erie Railway Co.*, 107 U. S. 81. The principle is also recognized in *United States* v. *Ferrary*, 93 U. S. 625; *National Bank* v. *Commonwealth*, 9 Wall. 353, and other cases.

2. In such case no notice or hearing is required, for none is necessary. The tax is in the nature of a specific tax.

Hagar v. Reclamation District, 111 U. S. 701, 709, and cases above cited.

3. There being a legitimate exercise of the taxing power, there is no violation of a contract arising from the deduction of the tax from the obligation by the debtor acting as a collector of the tax.

Haight v. *Railroad Company*, 6 Wall. 15.
United States Railroad Company, 17 Wall. 322.

The difference between this case and those of *State tax on foreign-held bonds*, 15 Wall. 300, and *Murray* v. *Charleston*, 96 U. S. 432, is as wide as possible. In this case the tax is upon bonds of resident bondholders; in those a tax

APPENDIX.

In the Supreme Court of the United States.

No. 1497, OCTOBER TERM, 1889.

BELL'S GAP RAILROAD
vs.
COMMONWEALTH OF PENNSYLVANIA.

STATE OF PENNSYLVANIA, }
DAUPHIN COUNTY, } *ss:*

W. H. Ulrich, being duly sworn according to law, deposes and says:

I am now, and was during the year 1887, and up to the present time, prothonotary of the Court of Common Pleas of Dauphin county. I was present in court during the trial of the case of Commonwealth of Pennsylvania *v.* Bell's Gap Railroad Company, to No. 53, March term, 1888. I am confident that no points were submitted on behalf of the defendant on the trial of said case. I never saw nor filed any such points. The docket entries and record of said case were carefully kept and carefully examined when the same was made up for the Supreme Court of Pennsylvania, and neither then nor at any other time were any such points on file in said case.

W. H. ULRICH.

Sworn and subscribed to before me this 2d day of January, A. D. 1890.

[SEAL.] HARVEY B. HOUCK,
Notary Public.

STATE OF PENNSYLVANIA, } ss:
DAUPHIN COUNTY, }

I, W. H. Ulrich, prothonotary of the Court of [SEAL] Common Pleas of Dauphin county, do hereby certify, that Harvey B. Houck, Esquire, was at the time annexed and foregoing affidavit was made, an acting notary public in said county and State, duly commissioned and qualified. and authorized by law to administer oaths, take acknowledgements of deeds, etc., and that the signature hereto affixed, purporting to be his. is genuine.

Witness my hand and the seal of said court, at Harrisburg. this 3d day of January, A. D. 1890.

W. H. ULRICH,
Prothonotary.

STATE OF PENNSYLVANIA, } ss:
County of Dauphin, }

John P. Melick, being duly sworn according to law, deposes and says:

I am now and was, during the year 1887 and up to the present time, Deputy Prothonotary of the Court of Common Pleas of Dauphin county. I have charge of the dockets of the said Court, and it is my duty to make, and I do make, the docket entries in cases pending in said Court. I was not present on the trial of the case of Commonwealth *v.* Bell's Gap Railroad Co., No. 53, March Term, 1889, in said Court of Common Pleas of Dauphin county. I never saw nor filed any paper purporting to be points of charge in said case. The docket entries and record of said case were carefully kept and carefully examined when the same was made up for the Supreme Court by attaching to the writ of error the original papers on file, and neither then nor at any other time were any such points on file in said case.

JOHN P. MELICK.

Sworn and subscribed to before me this third day of January, A. D. 1890.

[SEAL.]

J. WESLEY AWL,
Notary Public.

STATE OF PENNSYLVANIA, } ss:
Dauphin County, }

I, W. H. Ulrich, Prothonotary of the Court of Common Pleas of Dauphin county, do hereby certify, that J. Wesley Awl, Esquire, was at the time the annexed and foregoing affidavit was made, an acting notary public in said county and State, duly commissioned and qualified, and authorized by law to administer oaths, take acknowledgments of deeds, etc., and that the signature hereto affixed, purporting to be his, is genuine.

[SEAL]

Witness my hand and the seal of said Court, at Harrisburg, this 3d day of January, A. D. 1890.

W. H. ULRICH, *Prothonotary*.

AN ACT

To provide for the submission of civil cases to the decision of the court, and to dispense with trial by jury.

SECTION 1. *Be it enacted, &c.*, That in any civil case now pending in any of the courts of this Commonwealth, or hereafter to be commenced, after issue joined, the parties thereto, excepting those acting in a fiduciary capacity, may, by agreement filed in the proper office where such suit is pending, dispense with trial by jury, and submit the decision of such cases to the court having jurisdiction thereof; and such court shall hear and determine the same, and the judgment shall be subject to writ of error or of appeal as in other cases at law or in equity, at the option of either party.

SECTION 2. The decision of the court shall be in writing stating separately and distinctly the facts found, the answers to any points submitted in writing by counsel and the conclusions of law, and shall be filed in the office of the prothonotary or clerk of the proper court where the case is pending, as early as practicable, not exceeding sixty days after such decision shall have been made from the termination of the trial, and notice thereof shall be forthwith given by the prothonotary or clerk to the parties or their attorneys, and if no exceptions thereto are filed in the proper office within thirty days after service of such notice judgment shall be entered thereon by the prothonotary or clerk; if exceptions to the findings of facts or conclusions of law be filed within said thirty days, the court or the judge thereof who tried the case in vacation, may, upon argument, order judgment to be entered according to the decision previously

filed, or make such modifications thereof as in justice and right shall seem proper, subject always, nevertheless, to review by writ of error or appeal in the Supreme Court; such writ of error or appeal to be taken in the time and manner and with the effect prescribed by law.

SECTION 3. Every such case taken to the Supreme Court upon writ of error shall be heard and determined therein as writs of error are therein heard and determined; and every such case taken to the Supreme Court by appeal shall be heard and determined therein as cases of appeal in equity proceedings; and in case a new trial is ordered it shall be proceeded with before the same court in the same manner as hereinbefore provided for.

SECTION 4. An agreement to submit under this act shall be a waiver of the right of trial by jury.

SECTION 5. Cases submitted under the provisions of this act shall be subject to existing law as to costs, except no jury fee shall be required on entering judgment.

Approved the 22d day of April, A. D. 1874.

J. F. HARTRANFT.

A FURTHER SUPPLEMENT

To an act, entitled "An act to provide revenue by taxation," approved the seventh day of June, one thousand eight hundred and seventy-nine.

SECTION 1. *Be it enacted, &c.*, That all mortgages, money owing by solvent debtors, whether by promissory note, or penal or single bill, bond or judgment, also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever (except notes or bills for work or labor done, and all obligations given to banks for money loaned and bank notes), and all public loan or stocks whatsoever (except those issued by this Commonwealth or the United States), and all moneys loaned or invested in any other State, and all other moneyed capital in the hands of individual citizens of the State, shall be and are hereby taxable for State purposes, at the rate of three mills on the dollar of the value thereof annually: *Provided*, That the same shall, after the passage of this act, be exempt from all taxation, except for State purposes: *Provided*, The provisions of this act shall not apply to building and loan associations.

SECTION 4. That hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this Commonwealth, or the laws of any

other State, or of the United States, and doing business in this Commonwealth, upon the payment of any interest on any scrip, bond or certificate of indebtedness, issued by said corporation to residents of this Commonwealth, and held by them, to assess the tax imposed and provided for State purposes upon the nominal value of each and every said evidence of debt, and to report on oath, annually, on the first Monday of November, to the Auditor General, the amount of indebtedness of the corporation owned by residents of this Commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid and return the same into the State Treasury within fifteen days after the thirty-first day of December in each year; and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every failure to assess and pay said tax and make report as aforesaid, the Auditor General shall add ten per centum as a penalty to the amount of the tax; in payment of said tax by a corporation the bonds, certificates or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same.

Extracts from Act of March 30, 1811.

[Brightley's Purdon's Digest, Title, Public Accounts.]

Section 1. All accounts between the Commonwealth and any person or persons, body politic or corporate, as well those with the officers of the revenue, as other persons intrusted with the receipt, or who have or hereafter may become possessed of public money, also the accounts of all persons having claims on the Commonwealth, except as hereinafter excepted, shall be examined and adjusted by the Auditor General according to law and equity.

Section 3. When any public account is examined and adjusted, entered in the books of the office, and signed by the Auditor General, it shall be submitted, together with the vouchers and all other papers and information appurtenant thereto, to the State Treasurer, for his revision and approbation; and in order that the State Treasurer may be enabled to revise and examine the accounts so submitted to him, he is hereby invested with powers similar to those vested in the Auditor General by this act.

Section 11. If any person or persons, body politic or corporate, be dissatisfied with the settlement of his, her or their account by the Auditor General and State Treasurer, he, she or they may appeal therefrom to the Court of Common Pleas of the county in which the seat of government shall then be, and such appeal shall be transmitted by the Auditor General to the clerk of the said court, to be by him entered on record, subject to like proceedings, under the directions of the State Treasurer, as in common suits: *Provided, however*, That the appeal be filed in the office of the Auditor General within sixty days after notice of such settlement, and be accompanied with a specification of objections to the said settlement; and that the person or party appealing shall enter sufficient security before one of the judges of the Court of Common Pleas, within ten days next after such appeal, to prosecute such appeal with effect, and to pay all costs and charges which the Court or arbitrators shall award, and also pay any sum of money which shall appear, by the judgment of the said Court or award of arbitrators, to be due by him, her or them to the Commonwealth: *Provided, nevertheless*, That where any proceedings shall be had against any person or persons, who, upon summons and demand made, in pursuance of this act, shall have refused or neglected to exhibit his, her or their account to the Auditor General, as by this act is directed, such person or persons shall not be allowed any appeal from the settlement of the accountant officers, but the same shall be final.